THE LAW REPORTER.

MAY, 1847.

PLEA OF INSANITY IN CRIMINAL CASES.

We took an opportunity, not long since,[1] to call the attention of our readers to the unsatisfactory condition of the criminal law relative to insanity. In the brief interval between that time and the present, criminal trials in which insanity was pleaded in defence, have occurred in this country with unprecedented frequency, and given fresh occasion to lament the absence of those definite and well-settled principles which the nature of the subject demands, and the consequent working of much practical injustice. In judicial decisions and popular discussions, we have witnessed a remarkable disregard of established scientific facts, and a disposition to be governed by names and prescriptive usages, rather than the spirit of an enlightened jurisprudence. We can add but little, if anything, to what, in one place or another, we have already said on this branch of medical jurisprudence, and if we are forced to the Sisyphæan task of reiterating facts, with no other result than to see them utterly disregarded, or condemned as dangerous and visionary, it certainly is not our fault.

It is one of the most discouraging aspects presented by this subject, that the light which has been thrown upon it by the labors of those who have possessed favorable opportunities for laboring upon

[1] Law Reporter, February, 1845, Vol. 7, p. 449.

it successfully, is often regarded as unworthy of notice, and the whole matter treated as a *terra incognita* in which every one might speculate at pleasure. It is admitted that insanity is a phenomenon in mental and physical science, and that its nature and relations can be ascertained by observation alone. In the very face of this fact, however, how often is it treated by our courts as if it were susceptible of none of those improvements which the progress of knowledge is constantly effecting in every other branch of science. Their habitual reference to the views of distinguished jurists of bygone times, implies the belief that with them all inquiry had ceased, and it only remained for us to grope our way by the light that has travelled down from those distant luminaries. But is it true that the world has been standing still, on this point? that the general progress of medical science, the institution of hospitals for the insane, the more extensive and philosophical observation to which this class of persons have been subjected, have taught us nothing in regard to the medico-legal relations of insanity? Have they brought out no facts? Are we still obliged to float about on a sea of conjecture and speculation? Is it possible that in the middle of the nineteenth century, illumined, blazing as it is, with the torch of discovery, we can have no better guide than the wisdom of the seventeenth century? What should we say of a man who undertook to teach chemistry precisely as it was left by Priestley and Black? or of a botanist who should discourse on the functions and affinities of plants after the manner of Linnæus and his school? And yet a similar practical anachronism is frequently committed by our courts when required to settle some point in reference to the psychological effects of insanity. The question with them is, not what Esquirol, or Marc, or Haslam, or Rush, thought upon this or that point, but what Lord Hale or Lord Coke has laid down. Why this departure from the ordinary rules of conduct? What court in trying a case of surgical malpractice, in the operation of lithotomy for instance, should refuse to be enlightened by the experience of Cooper and Duypuytren, and manifest but little respect for any authority later than Ambrose Parè? Is there any good reason for such a distinction?

The ground may be taken, perhaps, that Hale and Coke are received as authorities, not for any pathological characters of insanity, but only for the legal consequences that ought to flow from it. They pretended to throw no light on natural phenomena, but simply to express an opinion founded on acknowledged data. But can we thus separate the legal consequences from the scientific facts? Have we any reason to believe that this distinction was

made by Lord Hale himself? He evidently was dissatisfied with the state of the law as he found it, and undertook to render it more definite, more systematic, and more in accordance with scientific truth. With such an object in view, we cannot suppose that he proceeded to lay down principles relative to the effect of insanity on legal responsibility without making himself acquainted with its phenomena as unfolded by observation, nor can we suppose that, under such circumstances, he would have been satisfied with superficial or limited information. On the contrary, in his elaborate, and well-matured account of the different kinds of insanity,[1] we have the first attempt of any legal writer, to systematize the principles that governed the practice of courts, and by the aid of the light derived from the best medical authorities, to give them all possible accuracy and completeness. That he freely consulted medical books and was ready to use their information, is perfectly obvious from the pathological views he adopts. From this source he learned that dementia accidentalis "sometimes proceeds from distemper of the humors of the body;" that mania "ariseth from adust choler, or the violent inflammation of the blood and spirits;" that "the moon hath a great influence in all diseases of the brain;" and that *lunatics* "commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually in the height of their distemper." He was obviously desirous of making his views faithfully reflect the knowledge of his times — of making his principles but the general expression of admitted facts. In saying that partial insanity ought not to excuse criminal acts, he uttered no dogma of his own. Such a consequence was a fair corollary from the current belief of the physicians of that day, that partial insanity does not impair a patient's perceptions of right and wrong, nor destroy the power, or disposition to pursue the one and avoid the other. The conclusions of the jurist were meant to be in accordance with those of the physician. Lord Hale used none of those metaphysical tests of responsibility so much in vogue since his day. Participating in the common opinion that insanity diminished the strength and capacity of the mind without perverting the intellectual or moral faculties, he was obliged to fix upon the limit to which this effect could be carried without impairing responsibility. Accordingly he decided, as the best measure he could devise, that "such a person as laboring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." This is wretched psychology

[1] Pleas of the Crown, 29.

certainly, but it was the best the times afforded, and Hale is not to be blamed for being no wiser than his own generation. Can we say as much of his successors, who think they have found the true test of legal responsibility in the knowledge of right and wrong, or the knowledge that the act in question was contrary to the laws of God and man, or the indications of design and shrewdness in the execution of the act, or some other trait with as little relation to responsibility as the ridiculous questions agitated by the schoolmen, had to the true science of mind. Had they manifested any of the great jurist's endeavors to shape his opinions by the light of science, instead of thoughtlessly reëchoing his principles, we should have been spared a host of decisions equally discreditable to jurisprudence, to medical science, and to humanity. How long is this course to be continued? How long are courts to go on laying down principles of responsibility, completely at variance with facts that have been established by observation beyond the reach of denial or doubt? Shall we be compelled to repeat and reiterate these facts, until the public are weary of the theme and begin to believe that we ourselves are mastered by a crotchet?

That the reader may have some idea of the immense discrepancy between the decisions of courts, and the results of observation, we give the principal points on which, from time to time, they have been at issue. The former say that insanity is not a valid defence of crime if the individual is able to distinguish right from wrong; or is conscious that the criminal act is forbidden by the laws of God and man, and will be followed by merited punishment; or if while perfectly aware of the nature and consequences of the act, and without any pretence of being governed by an irresistible impulse, he deliberately commits the act. Those, on the contrary, who are best acquainted with the phenomena of the diseased mind — who have studied them in the spirit of a profound and enlightened philosophy — tell us, that a very large proportion — nine-tenths at least — of the inmates of our insane hospitals, are able to distinguish between right and wrong with all their original acuteness; that others deliberately commit acts, knowing them to be contrary to law and followed by punishment which, perhaps, they are ready to receive, in order to obtain some fancied good, or from motives too vague and indefinite to be understood by others; that others — and the proportion is not a small one — who are regarded and treated as insane by all that know them best, who manifest the widest possible departure from their natural character and conduct, are incessantly bent on mischief, not from a misunderstanding of its nature and consequences, or an irresistible impulse to commit it,

but purely from a love of it. Such are the points on which the bench and the medical profession are at issue, and it is a question of vital importance to the community which shall prevail. That truth and justice will finally triumph, we do not doubt, but the cause of humanity requires that this event should happen speedily. To prepare the reader for the discussion on which we propose to enter, it may be well to glance at the most important points in the progress of judicial opinions on this subject.

Towards the commencement of the present century, there occurred an occasion for a great and signal modification of the law as expounded by Hale. It was the trial of Hadfield, who shot at the king in Drury Lane theatre, but missed his aim. That the prisoner was quite beside himself was obvious enough, but the law, as usually expounded, furnished him no protection. He was not quite reduced to the condition of a wild beast, and hang he must. In this emergency his counsel, Mr. Erskine, proposed a new construction of the law, viz., that a person laboring under a *delusion*, should not be held responsible for any criminal act that might spring from it. Strongly recommended by its own reasonableness, and enforced by all the ability of the eminent counsel, this principle was readily sanctioned by the court, moved thereto, in some measure, no doubt, by the fact that no feelings of retaliation required his sacrifice, and that he was justly entitled to protection. Without stopping here to show how often a principle more easily applied, and more nearly expressing the truth, than any previously presented, was completely disregarded on subsequent occasions, we shall just now only observe that, although quite correct so far as it goes, it does not cover all the necessary ground. While it is undoubtedly true that an insane person should be held irresponsible for a criminal act that springs directly from his delusions, we do not believe that he is always to be held responsible when such acts cannot be traced to a delusion. In a very large proportion of insane persons, we are unable to discover any fixed, definite delusion at all; oftentimes, even, when it is perfectly obvious that reason has been driven from her seat. Either the mind is rambling about from one subject to another, not dwelling on any definite notions, and giving utterance only to vague and disjointed expressions forgotten as fast as they are uttered; or else, while the manners and conduct are marked by extravagancies or peculiarities entirely unnatural to the individual, he is able to explain them by reasons sufficiently coherent and plausible to deceive the unwary, and never utters an expression manifestly stamped with insanity. The number exhibiting the latter phasis of derangement, is much larger

than is generally imagined. We once found, upon examination that in the Maine Insane Hospital, out of the sixty-eight patients which it then contained, fifteen entertained no delusion whatever. In the latter number were not included the demented, nor the convalescent, but only those who evinced a considerable degree of mental activity and power. And yet these persons were distinctly recognized by their friends and the community as unequivocally insane, and many of them belonged to the most troublesome class of patients, evincing but little self-control or self-respect, an utter loss of conscientiousness, and a complete dominion of the lower sentiments of our nature.

It is not our purpose to notice particularly the various tests of legal responsibility that have been promulgated by courts at different times, as no one has been generally approved of, and as all may be supposed to have been superseded by a later exposition of the law, which we shall presently examine. Either they have not squared with the views of those who rejected them, touching the psychological effects of insanity, or have been found inapplicable to the case in hand, though it might justly need the protection of the law. Out of the scanty materials possessed by men whose only knowledge of insanity was derived from writers who knew as little as themselves, or, perhaps, from the observation of a few insulated cases, general principles have been formed one after another, each in its turn supposed to cover the whole ground in question, but found, in practice, to come far short of that object. Whenever a case has come up which the court has deemed to be entitled to protection, but which no previous exposition of the law could reach, a new one has been found, calculated, as its author has flattered himself, not only to meet the emergency in hand, but to remedy all existing deficiencies, and be applicable to every possible case. This course, no doubt, meets the difficulty of the occasion, and if every case were thus judged upon its own merits, there would be far less room for complaint. But every case has not and will not be judged upon its own merits. When the insanity of the accused has been manifest to the most superficial observer, or the actual injury committed by him, has been little or nothing, or he has had the aid of powerful friends and eminent counsel, the imperfection of the law has not of late years been allowed to prevent his acquittal. But when the opposite of these conditions has existed — when the insanity of the accused has been of a kind requiring some time and investigation to discover, or the popular feeling is aroused against him, and demands a victim, or he appears at the bar friendless and unknown, then the law is taken as it comes, and an act of great practical injustice is committed.

In the spring of 1843, a Scotchman named McNaughton met, in one of the streets of London, Mr. Drummond, the private secretary of Sir Robert Peel, and shot him dead with a pistol. For some time previous, he had entertained the delusion that he was pursued by enemies who followed him everywhere, blasting his fame, disturbing his peace, and filling him with intolerable inquietude; and fancying his victim to be one of the crew, he determined to sacrifice him. His insanity was not obvious at sight, he had recently transacted business, he viewed some of his relations in their true light, and behaved with much propriety in the ordinary intercourse with men. He was defended by able and zealous counsel, who brought before the jury the more sound and humane views of insanity which have resulted from modern inquiry, and the court readily favored his acquittal. The community, however, were far from being satisfied with this result, for it beheld only two facts in the case, — a worthy man had been shot down in broad day and without provocation, by one who could transact business, discourse correctly, and who showed no very obvious symptoms of insanity. Participating in the popular feeling, the house of lords propounded to the law-judges certain queries relative to the law of England on the subject of insanity as a defence in criminal actions. The queries implied a doubt of the correctness of the doctrine that delusion, in and of itself alone, is necessarily an exculpatory plea, and seemed to suggest the idea that, to have this effect, it must be accompanied by some other mental disability. They were intended, no doubt, to obtain an authoritative exposition of the law that should settle its principles and regulate the future practice of courts. They wished, indeed, to obtain from the judges collectively what had eluded their grasp individually — a general expression of the law capable of embracing every possible case, and working injustice to none. We shall see whether the attempt of the judges fulfils this high object.

The first query is, "what is the law respecting alleged crimes committed by persons afflicted with insane delusions in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?" To this the judges reply that, assuming the inquiry "to be confined to those persons who labor under such partial delusions only, and are not in other respects insane, they are of the opinion, that notwithstanding the party accused did the act complained of, with a view,

under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression they understand their lordships to mean, the law of the land."

Had the principle here laid down, been always strictly followed, it is very certain that many a one who has been acquitted on the ground of insanity, would have met the fate of ordinary criminals. Hadfield knew — so far as a man in his condition may be said to *know* anything — that in shooting at the king, he was doing an illegal act, because, when apprehended, he declared that his life was forfeited, and that he did the deed for this very purpose, in order that by his own death, he might fulfil some great end to which he fancied himself to have been called. The mental disability of the insane may be evinced, not in failing to recognize the illegality of their acts, but in considering themselves as absolved from the obligations of the law. An act which they know to be forbidden, they may feel constrained to commit by reasons that transcend all law. They move in a sphere beyond the reach of the ordinary motives of human conduct, and are a law unto themselves. It is certainly very unreasonable for any one to believe, that to revenge a private grievance, or secure a public benefit, he may set aside all law and take any and every extreme measure that may seem to him necessary for the purpose. But shall we be guilty of the absurdity of expecting an insane person to act *reasonably* in reference to his delusions?

The doctrine in question, we may observe in passing, has been defended on the ground of its preventive influence, the idea being that the fear of punishment will deter the insane from revenging private grievances or securing public benefits by illegal means; and the management of the insane in hospitals where they are excited to behave with propriety by the promise of reward, and deterred from wrong doing by the fear of being deprived of some privilege or indulgence, is confidently appealed to in support of this idea. It is unquestionably the practice to present to the insane motives for maintaining their self-control, but it is not the fact that when such motives fail to produce the end in view, they are punished. They are deprived of a privilege or indulgence, not as a punishment, but because they have shown themselves to be incapable of enjoying them. No one at all acquainted with the insane can suppose that they would be deterred from any course whatever, by force of legal enactments. They would say to themselves, for

there is nothing too absurd for the insane to believe, that their case is an exception to the general rule, and that they are about to do something that will receive universal approbation, or that they are bound by solemn obligations to do the act, whatever may be the consequences. The only logic used by the insane is, that the end justifies the means.

The second and third queries are "what are the proper questions to be submitted to the jury, when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence? In what terms ought the questions to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?"

The judges state that these two questions can be more conveniently answered together, and their reply is, that, "to establish a defence on the ground of insanity, it must be clearly proved, that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." They add that the question of right and wrong should be put in reference to the particular act with which he is charged.

The principle of responsibility here laid down, manifestly conflicts with that promulgated in the answer to the first query. An insane person may do an act he knows to be contrary to law, because he thinks the peculiar circumstances of the case render it *right* for him to disregard the law. We have just seen that Hadfield admitted that he had violated the law, but believed he was right in so doing, for the sake of the great end which it would enable him to accomplish. Tried by the former test, he would have been convicted, while by the latter he would have been acquitted. Without mentioning all the objections to which this test of responsibility is liable, it is enough to say that it furnishes no protection to that large class of the insane who entertain no specific delusion, but act from momentary irresistible impulses, or diseased moral perceptions.

The fourth query is, "If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?" To this the judges reply, that, on the assumption "that he labors under partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility, as if the facts, with respect to which the delusion exists, were real. For example, if under the influence of delusion,

he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

Such a remarkable doctrine as this can have sprung from only the most deplorable ignorance of the mental operations of the insane. If the insane person really believe that his neighbor is engaged in a conspiracy to take his life, he may anticipate the blow by killing him; but if he merely believes that the said neighbor has inflicted a serious injury on his character or fortune, the law will not hold him guiltless if he hurt a hair of his head! This is certainly very plain, and it must be the fault of the lunatic, if he do not understand it. It is very reasonable, too, *if insane men would but listen to reason*. This, however, they will not do, but go on confounding the clearest moral distinctions, in the saddest possible manner. This doctrine of the English judges seems to be essentially that of Hoffbaner, who says that the acts of the accused should be judged, precisely as if he were really in the circumstances he imagined. That is, if he fancies there is a design to take his life, *he* may take life; if he fancies that he is only insulted or railed at, *he* may insult or rail, in turn; if he fancies his neighbor is defrauding him, *he* may say hard things about him, (taking care to utter no matter libellous,) or bring against him a suit at law. This is virtually saying to a man, "you are allowed to be insane; the disease is a visitation of Providence, and you cannot help it; but have a care how you manifest your insanity; there must be method in your madness. Having once adopted your delusion, all the subsequent steps connected with it must be conformed to the strictest requirements of reason and propriety. If you are caught tripping in your logic, if in the disturbance of your moral and intellectual perceptions, you take a step for which a sane man would be punished, insanity will be no bar to your punishment. In short, having become fairly enveloped in the clouds of mental disorder, the law expects you will move as discreetly and circumspectly as if the undimmed light of reason were shining upon your path.

The notion, somewhat common among legal authorities, that insanity does not prevent a person's conduct from harmonizing with his belief, probably originated with Locke, who thought that the insane reason correctly upon wrong premises. Locke had meditated deeply upon the operations of the sane mind, and perceived many of the laws that govern them, but of the insane mind

he knew less than the humblest servant in a lunatic asylum. Such a one would have told him, that while here and there a patient might reason very pertinently concerning his delusions, the discourse of most of them is full of inconsistency and incoherence. Indeed, it would be difficult to find an instance of an insane person with delusions ever so limited, who does not, every day, violate the plainest rules of logic. One who believes his legs are made of glass, may take great pains to secure them from contact with other bodies, but a blow strong enough to shiver the strongest glass to atoms would fail to convince him of his error. The lady who fancied that a tooth extracted by a dentist had slipped from his fingers into her throat, and prevented her from swallowing, while she ate and drank as well as anybody, was incorrect in every stage of her reasoning.

The principle in question is not supported by our knowledge of the psychological effects of insanity, and cannot be followed out without working great injustice. McNaughton did not suppose that Mr. Drummond nor any one else was seeking his life, but that his fancied enemies followed him about, traducing his reputation and disturbing his peace. There was no proof that he apprehended any deadly injury, and yet he was acquitted with the approbation of the judge, *by whom this principle was not once mentioned*—the very Chief Justice Tindall who read the answers of the judges to the Lords, and probably had the principal share in framing them. Oxford, too, who shot at the queen, did not imagine that he had sustained any personal wrong from her or any one else, but that killing the queen was necessary in order to accomplish some great public benefit. Yet he was acquitted with the approbation of the court, Lord Denman, who said nothing of this principle in his charge to the jury, though he joined in the reply to the queries of the Lords.

It is beyond our power to conceive how this principle can be reconciled with that conveyed in the reply to the second and third queries. Most if not all those lunatics who, like McNaughton, take life in order to revenge some supposed injury to their character or fortune, have a strong belief that they are doing right. Nothing is more common than for the insane to be guilty of the utmost violence towards persons from whom they fancy they have received only some trivial offence, while their views of law and right on this point, are so confused and perverted, that they might as well, for any good influence they exert, be obliterated altogether. And it is because their mental perceptions are so dull and distorted that they do not proportion their measures of retaliation by the

same rules that govern sane men. But now, it seems, the state of the person's mind, the extent of the morbid influence of the disease over his perceptions of truth, and right and propriety, and the degree to which it has consigned him to the dominion of delusion and passion, are no longer to be considered in settling the extent of his legal responsibility, — we are to look only to his acts, and these are to be judged of as if committed by perfectly sane men. If any further proof were wanting, of the vague, contradictory, and erroneous notions relative to the psychological effects of insanity which have led to the various judicial tests of responsibility, we have a conclusive one here.

Mr. Justice Maule gave in a separate opinion, but we do not see, amid the maze of verbal distinctions which he adopts, that he materially differs from the rest. It is not the first time, however, that a difference of words has been supposed to indicate a difference of ideas. He says he should have been glad had his learned brethren joined him in praying their lordships to excuse them from answering these questions, and we are not sure that the interests of humanity and justice would have suffered, had the request been made and complied with.

This, then, is the point at which we have arrived — *that the law is now as far from being settled as ever.* Is there not, therefore, reason to believe that the notions respecting insanity that prevail in courts, are wrong; that men have attempted to establish distinctions that have no foundation in nature; and have deduced general rules from a very partial view of the facts. In a future number we propose to show that the prevalent notions respecting the psychological effects of insanity, are very wide of the truth, and consequently can never serve as the groundwork of an enlightened jurisprudence.

Recent American Decisions.

Supreme Court of the State of New York, February, 1847.

WILLIAM FREEMAN, IN ERROR, *v.* THE PEOPLE.

The provision of the Revised Statutes of New York, (2 R. S. 697, § 2,) that "no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state," does not alter the

common law, and is only confirmatory of the common law principle on the subject.

Though other modes of determining the question of insanity, as a preliminary question, may be resorted to, a trial by jury is regarded as the most discreet and proper course.

A preliminary trial of the question of insanity is not a trial of the indictment, within the meaning of the statute allowing exceptions to be taken, and they cannot then be regularly taken and carried up.

The prisoner has not the right to challenge peremptorily on such preliminary trial.

The triors of challenges to jurors, drawn for such preliminary trial, should not be sworn to try and find whether the juror was indifferent between the people and the prisoner, "upon the issue joined;" but whether the juror was indifferent between the people and the prisoner.

An instruction to the jury, that the main question was, whether the prisoner knew right from wrong, and that if he did, then he was to be considered sane, was erroneous. But if a prisoner is capable of understanding the nature and object of the trial, and his own condition in reference thereto, and can conduct his defence in a rational manner, he is, for the purpose of being tried, to be deemed sane.

A verdict of the jury, that the prisoner is "sufficiently sane, in mind and memory, to distinguish between right and wrong," is defective.

Where, on the trial of an indictment for a capital offence, the prisoner objects to jurors for cause, his objections are overruled, he takes exceptions to the ruling, and afterwards challenges the same jurors peremptorily, and they do not serve, he cannot afterwards take advantage of those exceptions.

When a juror is challenged for principal cause or to the favor, the ground of the challenge should be distinctly stated; for without this the challenge is incomplete, and may be disregarded by the court.

Where exceptions were taken to a charge to triors, in a capital case, and the exception extended, in terms, to "every part and portion" of the charge, the exceptions cannot be overruled as deficient in certainty.

Where the court instructed the triors, as matter of law, that having formed a hypothetical opinion does not disqualify a juror, the instruction was erroneous. The evidence should have been left to the common sense of the triors, and the question should be, whether they were convinced that actual bias existed.

It is also erroneous to instruct the triors, that a resort to triors by a challenge to the favor, is in the nature of an appeal from the decision of the court.

The verdict of the jury on the preliminary issue of insanity, cannot be considered as conclusive upon the trial of the indictment; and in strictness, is not before the court and jury on the trial of the issue of guilty or not guilty, nor in any respect material thereto.

A medical witness for the defence may be asked his opinion as to the insanity of the prisoner, at the time of the offence, though founded on an examination made by him four months afterwards. But the lateness of the time when the examination was made, and the character of the malady, are to be considered, in determining the weight of such opinion.

Beardsley, J. The prisoner was tried at a court of oyer and terminer, held for the county of Cayuga, and found guilty of the crime of murder, upon which verdict sentence of death was pronounced.

In the course of the trials, preliminary and final, a multitude of exceptions were taken by the prisoner's counsel, which, with the record of the conviction and sentence, have been brought into this court by writ of error. These exceptions, or such of them as the counsel for the prisoner supposed to be available, were argued at the last term of this court, and having since been examined and considered, with care and deliberation, I am now prepared to dispose of them, by rendering judgment on the case before us.

When the prisoner was brought before the court of oyer and terminer, to be arraigned on the indictment, a plea that he was then insane was interposed by counsel on his behalf, which being denied by the public prosecutor, a jury was empanelled to try the issue so joined. On the trial of this issue, various objections were made and exceptions taken, by the prisoner's counsel; and the first question to be decided is, whether these exceptions can be re-examined on a writ of error. The statute declares that "No insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state." (2 R. S. 697, § 2.) This, although new as a legislative enactment in this state (3 Id. 832), was not introductory of a new rule; for it is in strict conformity with the common law on this subject. "If a man," says Sir William Blackstone, "in his sound memory, commits capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it — because he is not able to plead to it, with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound mind, he might have alleged something in stay of judgment or execution. Indeed," it is added, "in the bloody reign of Henry the Eighth, a statute was made, which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute of 1 and 2 Ph. and M., ch. 10. For, as is observed by Sir Edward Coke, 'the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes perveniat.*' But so it is not, when a mad man is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." (4 Bl. Comm. 24.) The true

reason why an insane person should not be tried is, that he is disabled by an act of God to make a just defence, if he have one. As is said in 4 Harg. State Trials, 205, "There may be circumstances lying in his private knowledge which would prove his innocency of which he can take no advantage, because not known to the persons who shall take upon them his defence." The most distinguished writers on criminal jurisprudence concur in these humane views; and all agree that no person in a state of insanity should ever be put upon his trial for an alleged crime, or be made to suffer the judgment of the law. A madman cannot make a rational defence; and as to punishment, *furiosus solo furore punitur*. (Hale P. C. 34, 35; 4 Bl. Comm. 395, 396; 1 Ch. C. L., Ed. 1841, p. 761; 1 Russ. on Crimes, Ed. 1845, p. 14; Shelf. on Lunacy, 467, 468; Stock on *Non Compotes Mentis*, 35, 36.)

The statute is explicit, that "no insane person can be tried;" but it does not state in what manner the fact of insanity shall be ascertained. That is left, as at common law; and although in the discretion of the court, other modes than that of a trial by jury may be resorted to, still, in important cases, that is regarded as the most discreet and proper course to be adopted. See the authorities last referred to; also 1 Hawk. P. C., by Carwood, page 3 and note; Steph. C. L. 3, 4, 280, 334. At common law, the only regular mode of redress for errors occurring on criminal trials, was by motion for a new trial in the court where the trial was had, unless the error was in some matter which formed a part of the record, when it might be reviewed after judgment by writ of error. Bills of exceptions, by which questions of law, made and decided on such trials, may be brought up and reviewed in higher courts, were unknown to the common law, although now allowed by a statute of this state. But the statute is limited to exceptions taken on the trial of the main issue, and does not reach such as are made on the trial of a preliminary or collateral question. The words are, "on the trial of any indictment, exceptions to any decision of the court may be made by the defendant in the same cases and manner provided by law in civil cases." (2 R. S. 736, § 21; see also 3 Id. 849.) A trial of the question of present insanity is not a *trial of the indictment*, but is preliminary to such trial. The object in a case situated as this was, is simply to determine whether the person charged with an offence and alleged to be insane, shall be required to plead and proceed to the trial of the main issue of guilty or not guilty. The statute does not authorize exceptions to be taken on such preliminary trial; and if errors occur, they must be corrected, if at all, as at common law, by the court which com-

mitted them. For this reason none of the exceptions taken by the prisoner's counsel on the trial of the preliminary issue in this case, can be regarded as regularly before us; nor could they, if held to be well taken, constitute a ground for reversing the judgment of the court below. This part of the case might here be dismissed; but I choose not to do so, lest an implication should arise that in the opinion of this court the preliminary trial was conducted throughout with regularity and according to law.

On the preliminary trial the counsel for the prisoner claimed the right to challenge jurors peremptorily, as it is conceded to exist on the trial of the main issue. This the court refused to allow; and it seems to me correctly. Peremptory challenges are allowed *in favorem vitæ*, and at common law are restricted to the main issue, in which the life of the party is in jeopardy, and cannot be made on the trial of any collateral issues whatever. (2 Hale, P. C. 267, chap. 35; Bac. Abr. Juries, E. 9, Foster C. L. 42; 4 Bl. Com. 353, 396; Co. Litt. 156. B; *The King* v. *Radcliffe*, 1 W. Bl. Rep. 3–6.) To the like effect is the statute which secures to "every person arraigned and put on his trial for any offence punishable with death, or with imprisonment in a state prison ten years or any longer time," the right peremptorily to challenge twenty of the persons drawn as jurors for such trial." (2 R. S. 734, § 9.) This preliminary trial was not a "trial for any offence" whatever; and there was no error in refusing to allow peremptory challenges to be made. Challenges for cause are allowable on the trial of preliminary as well as final issues. This was conceded; and several of this description were interposed on behalf of the prisoner. I pass by these without particular examination, as this class of challenges will again be presented for consideration before the case is closed, when such suggestions will be made as are deemed pertinent to this as well as other parts of this case.

An objection was made to the oath as administered to some of the triors of challenges to jurors drawn for this preliminary trial. The oath was thus; "You do solemnly swear that you will well and truly try, and well and truly find whether the juror is indifferent between the people of the state of New York, and the prisoner at the bar, upon the issue joined." This form of oath was not administered in every instance, the qualification at its close made by the words "upon the issue joined" being sometimes omitted, as it should have been throughout. The oath, as given in books of approved credit and authority, contains no such limitation — but requires the triors to find whether the juror is or is not indifferent between the parties to the controversy. (Trials Per Pais, 205; 1 Ch.

C. L. 549; Bac. Abr. Juries, E. 12, note; 1 Cow. 441, note; 1 Salk. 152.) And jurors should be so. It is not enough that they are indifferent upon the particular issue to be tried. An actual and thorough impartiality in regard to the parties is required, for no one who labors under prejudice, malice or ill-will towards another, can be in a fit frame of mind to act impartially where his rights are in question. In *Brittain* v. *Allen* (2 Dev. 120) the defendant challenged a juror for cause, to wit; hostility between the juror and the party challenging. The challenge was overruled, and the juror was sworn. On a motion for a new trial, Henderson, Ch. J., said—"It seems that the judge disregarded all kinds of hostility but that which related to the *particular suit then to be tried.* I think that the law is otherwise. The juror should be perfectly impartial and indifferent. Causes apparently very slight are good causes of challenge; and that which is good cause for quashing the array, is good cause of challenge to the polls. I mention this, as most, at least many, of the cases are challenges to the array. If the sheriff be liable to the distress of either party, or if he be his servant or counsellor, or if he has been godfather to a child of either of the parties or either of them to his, or if an action which implies malice, as assault and battery, slander or the like, is depending between them, these all are causes of principal challenges. (Bac. Abr. Juries, F. 1.) From these cases, particularly the one which states a suit pending which implies malice, it appears that general hostility, by which I mean that which is not confined to the particular suit, is ground of challenge. From these causes the law of itself implies a want of indifference, which the defendant offered to show. I think he ought to have been permitted to do so, and if he succeeded, that the juror should not have been sworn. For this cause, and for this only, there should be a new trial." So in the case at bar, the oath only required the triors to find indifference between the parties, "upon the issue" then to be decided. In other respects, if the clause is susceptible of any meaning, the juror, although a sworn enemy of the prisoner, might still be found by the triors to be a competent and proper person to pass upon the question then to be decided. This would be intolerable; and an oath which requires or will admit of such a construction, cannot be correct. There is no precedent for one in this form, as will be seen from looking at the authorities already referred to. At the very best, the clause objected to is unmeaning, or ambiguous. But an oath should be plain, explicit, and free from all ambiguity. If this clause does not necessarily affix an improper limitation to the obligation which the law seeks to cast upon the trior by the

oath administered to him, it is very liable so to be construed and understood as to have that effect.

In charging the jury on the preliminary issue which we have seen was on the fact of present insanity, the court said, "the main question with the jury was to decide whether the prisoner knew right from wrong. If he did, then he was to be considered sane." The statute before cited is emphatic, that "no insane person can be tried." In its terms the prohibition is broad enough to reach every possible state of insanity, so that if the words are to be taken, literally, no person while laboring under insanity, in any form, however partial and limited it may be, can be put upon his trial. But this the legislature could not have intended, for, although a person totally bereft of reason cannot be a fit subject for trial or punishment, it by no means follows that one whose insanity is limited to some particular object or conceit, his mind in other respects being free from disease, can justly claim the like exemption. This clause of the statute should receive a reasonable interpretation, avoiding on the one hand what would tend to give impunity to crime and on the other seeking to attain the humane object of the legislature in its enactment. The common law equally with this statute, forbids the trial of any person in a state of insanity. This is clearly shown by authorities which have been referred to, and which also show the reason for the rule, to wit — the incapacity of one who is insane to make a rational defence. The statute is in affirmance of this common-law principle, and the reason on which the rule rests, furnishes a key to the intention of the legislature. If, therefore, a person arraigned for a crime, is capable of understanding the nature and object of the proceedings going on against him, if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defence in a rational manner, he is, for the purpose of being tried, to be deemed sane; although on some other subjects his mind may be deranged, or unsound. This is, as it seems to me, the true meaning of the statute, and such is the construction put by the English courts on a similar clause in an act of parliament. By the 39 and 40 Geo. 3, ch. 94, sec. 2, it is enacted that "if any person indicted for any offence, shall be insane, and shall, upon arraignment be found so to be by a jury lawfully empanelled for that purpose, so that such person cannot be tried upon such indictment" — "it shall be lawful for the court before whom any such person shall be brought to be arraigned" — "to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody till his majesty's pleasure shall be known." (1 Russ. on Cr. 15.) The

question upon this statute is the same as upon ours; that is, is the alleged offender insane? Russel says, p. 15, "If a prisoner have not at the time of his trial, from the defect of his faculties, sufficient intelligence to understand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding he may be ordered to be kept in custody, under this act." For this he refers to the case of *Rex* v. *Dyson*, (7 C. and P. 305; same case, 1 Lewin C. C. 64, before Mr. Justice J. Parke, in 1831.) In that case the prisoner was indicted for murder, and on being arraigned stood mute. A jury was then empanelled to try whether she did so by malice or by the visitation of God, and they found she did so by the visitation of God. The judge thereupon examined on oath a witness who was acquainted with the prisoner, and who swore that she could be made to understand some things by signs, and could give her answers by signs. The witness was then sworn to interpret and make known to the prisoner the indictment and charge against her; and to the court, her plea and answer thereto. The witness explained to her by signs what she was charged with, and she made signs which imported a denial of the charge: whereupon the judge directed a plea of not guilty to be recorded. The witness, by direction of the court, then stated to her that she was to be tried by a jury, and that she might object to such as she pleased. But she testified that it was impossible to make her comprehend a matter of that nature, although she might understand subjects of daily occurrence which she had been in the habit of seeing. A jury was thereupon "empanelled and sworn to try whether she was sane or not" — and proof was given of "her incapacity at that time to understand the mode of her trial, or to conduct her defence." The judge "told the jury that if the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane." The jury so found, and the prisoner was detained in close custody, as the statute directs. A similar case occurred in 1836, which was disposed of in the same way. Alderson, B. said to the jury — "The question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge." *Rex* v. *Pritchard*, (7 C. and P. 303.) Both these prisoners had been at all times deaf and dumb. In presumption of law such persons are always idiots or madmen, although it may be shown that they have the use of understanding, and are capable of committing crimes, for which, in that event, they should be punished. (Russ. on Cr. 6; Shelf. on Lunacy, 3.)

In the case of the *Queen* v. *Goode*, (7 A. & E. 536,) which occurred in 1837, the prisoner was brought into the court of queen's bench, and arraigned on an indictment for a misdemeanor. As he showed clear symptoms of insanity, a jury was immediately empanelled to try whether he was then insane or not; and upon evidence given, as well as upon his appearance in court, the jury found that he was insane. The prisoner was thereupon detained in custody under the statute. In *Ley's case*, (1 Lewin, C. C. 239,) on the trial of a similar question, Hullock B. said to the jury — "If there be a doubt as to the prisoner's sanity — and the surgeon says it is doubtful — you cannot say that he is in a fit state to be put upon his trial." The court of common law was much the same. In *Firth's case*, (22 How. State Tr. 307, 318,) which preceded the act of 39 and 40 Geo. 3, to which reference has been made, the prisoner was arraigned for high treason, and a jury sworn to inquire whether he was of sound mind and understanding or not. Lord Kenyon, chief justice of the king's bench, presided at the trial, assisted by one of the barons of the court of exchequer, and one of the judges of the court of common pleas. It was observed by the court to the jury, that the inquiry was not whether the prisoner was insane when the alleged crime was committed, nor was it necessary to inquire at all what effect his present state of mind might have when that question came to be discussed. But the humanity of the law of England had prescribed that no man should be called upon to make his defence at a time when his mind was in such a situation that he appeared incapable of doing so; that however guilty he might be, the trial must be postponed to a time when, by collecting together his intellects, and having them entire, he should be able so to model his defence, if he had one, as to ward off the punishment of the law, and it was for the jury to determine whether the prisoner was then in that state of mind. (Shelf. 468.)

With these lights before us, the construction of the statute which forbids the trial of any insane person, cannot be attended with much difficulty. A state of general insanity, the mental powers being wholly perverted or obliterated, would necessarily preclude the trial, for a being in that deplorable condition can make no defence whatever. Not so, however, where disease is partial and confined to some subject other than the imputed crime and contemplated trial. A person in this condition may be fully competent to understand his situation in respect to the alleged offence, and to conduct his defence with discretion and reason. Of this the jury must judge; and they should be instructed that if such should be found

to be the case, it will be their duty to pronounce him sane. In the case at bar the court professed to furnish a single criterion of sanity, that is, a capacity to distinguish between right and wrong. This, as a test of insanity, is by no means invariably correct; for while a person has a very just perception of the moral qualities of both actions, he may at the same time, as to some one in particular, be absolutely insane, and consequently, as to this, be incapable of judging accurately between right and wrong. If the delusion extends to the alleged crime or the contemplated trial, the party manifestly is not in a fit condition to make his defence, however sound his mind may, in other respects, be. Still, the insanity of such a person being only partial, not general, a jury under a charge like that given in this case, might find the prisoner sane; for in most respects he would be capable of distinguishing between right and wrong. Had the instruction been that the prisoner was to be deemed sane if he had a knowledge of right and wrong in respect to the crime with which he stood charged, there would have been but little fear that the jury could be misled; for a person who justly apprehends the nature of a charge made against him, can hardly be supposed incapable of defending himself in regard to it, in a rational way. At the same time, it would be well to impress distinctly on the minds of jurors, that they are to guage the mental capacity of the prisoner in order to determine whether he is so far sane as to be competent in mind to make his defence if he has one; for unless his faculties are equal to that task, he is not in a fit condition to be put on his trial. For the purpose of such a question the law regards a person thus disabled by disease as *non compos mentis*, and he should be pronounced unhesitatingly to be insane, within the true intent and meaning of this statute. Where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time when the act was done. In such cases the jury should be instructed that "it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing — or if he did know it, that he did not know he was doing wrong." The mode of putting the latter part of the question to the jury on these occasions, has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely if ever, leading to any mistake with the jury, is not deemed so accurate when put generally and in the abstract, as when put with reference to

the party's knowledge of right and wrong in respect to the very act with which he is charged." (2 Greenl. Ev. § 373.) This is the rule laid down by all the English judges but one in the late case of McNaughton, while pending in the house of lords. The case is reported in 10 Clarke & Fin. 200, and the opinion of the judges may be found in a note to the section of Green. Ev. referred to. In *Regina* v. *Oxford*, (9 C. & P. 525,) Lord Denman, Ch. J. charged the jury in this manner: "The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime." The insanity must be such as to deprive the party charged with crimes, of the use of reason in regard to the act done. He may be deranged on other subjects, but if capable of distinguishing between right and wrong in the particular act done by him, he is justly liable to be punished as a criminal.

Such is the undoubted rule of the common law on this subject. Partial insanity is not necessarily an excuse for crime, and can only be so where it deprives the person of his reason in regard to the act charged as criminal. Nor in my judgment was the statute on this subject intended to abrogate or qualify the common law rule. The words of the statute are, "No act done by a person in a state of insanity can be punished as an offence." (2 R. S. 697, § 2.) The clause is very comprehensive in its terms, and at first blush might seem to exempt from punishment every act done by a person who is insane *upon any subject whatever*. This would, indeed, be a mighty change in the law, as it would afford absolute impunity to every person in an insane state, although his disease might be confined to a single and isolated subject. If this is the meaning of the statute, jurors are no longer to inquire whether the party was insane "in respect to the very act with which he is charged," but whether he was insane in regard to any act or subject whatever; and if they find such to have been his condition, render a verdict of not guilty. But the statute is not so understood by me. I interpret it as I should have done if the words had been "no act done by a person in a state of insanity," in respect to such act, "can be punished as an offence." The act, in my judgment, must be an insane act, and not merely the act of an insane person. This was plainly the rule of law before the statute was passed; and although that took place more than sixteen years since, I am not aware that it has at any time been held or intimated by any judicial

tribunal, that the statute had abrogated, or in any respect modified this principle of the common law.

But to return to the trial of the preliminary question in the present case. The jury found, not as the issue required them to do, that the prisoner was or was not insane, but that he was "*sufficiently* sane, in mind and memory, to distinguish between right and wrong." This verdict was defective. It did not directly find anything, and certainly not the point in issue; but evaded it by an argumentative finding. At the utmost, the jury only made an approach towards the point to be decided, but failed to reach it. They should have been required to pass directly on the question of insanity, and should not have been allowed to evade it by an argumentative verdict of any sort. Such a finding as this would be objectionable in a civil proceeding. *Matter of Morgan*, a lunatic, (7 Paige, 236,) and in a criminal case should not be allowed.

The preliminary trial being closed, a plea of not guilty was entered for the prisoner; and the court proceeded to the trial of the main issue. Numerous objections were taken in the course of the trial by the counsel for the prisoner, most of which were obviously not well founded, and were properly overruled by the court. I shall notice but four of the points excepted to, as it is deemed unnecessary to give to each of them a separate examination.

Several persons, drawn as jurors, were in the first place challenged for principal cause, by the counsel for the prisoner; but the court held that these challenges were not sustained by the evidence adduced in their support. Challenges to the favor were then interposed; but the jurors were found by the triors to be indifferent. Various exceptions were taken by the prisoner's counsel to points made and decided in disposing of these challenges; and although the several jurors thus challenged were ultimately excluded by the peremptory challenge of the prisoner, it is now urged that these exceptions are still open to examination and review in this court. I think otherwise. The prisoner had the power and the right to use his peremptory challenges as he pleased; and the court cannot judicially know for what cause or with what design he resorted to them. *The People* v. *Bodine*, (1 Denio, 310.) He was free to use or not use them, as he thought proper; but having resorted to them, they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose, by his own voluntary act, to exclude these jurors; and thus virtually, and, as I think,

effectually, blotted out all such errors, if any, as had previously occurred in regard to them.

But the case of the juror Bench stands on other grounds. He was first challenged, as is said, for principal cause; which, after evidence had been given, was overruled by the court. He was then challenged to the favor; but the triors found him to be indifferent. No peremptory challenge was made, and he served as one of the jury. As to this juror, every exception taken by the prisoner's counsel is now here for examination and revision. When a juror is challenged for principal cause or to the favor, the ground of the challenge should be distinctly stated; for without this the challenge is incomplete, and may be wholly disregarded by the court. It is not enough to say, I challenge for principal cause or to the favor, and stop there. The cause of the challenge must be specified. In *Man* v. *Glover*, (2 Green. R. 195,) the court say: "A party cannot make a principal challenge or a challenge to the favor by giving it a name. A challenge, whether in writing or by parol, must be in such terms that the court can see in the first place, whether it is for principal cause or to the favor, and so determine by what form it is to be tried, and secondly, whether the facts, if true, are sufficient to support such challenge." Again, the challenger must "state why the juror does not stand indifferent. He must state some facts or circumstances, which, if true, will show either that the juror is positively and legally disqualified, or create a suspicion that he is not, or may not be impartial. In the former case the challenge would be a principal one, triable by the court — in the latter it would be to the favor, and submitted to the triors." These views are sound and appropriate, and their observance would greatly promote order and convenience in the determination o challenges. I am aware that challenges are not unfrequently made in general terms, which merely indicate the supposed character of the challenge, as for principal cause or to the favor; but without designating the particular grounds by which, if at all, it must be sustained. In this posture of the question, as far as a question can be said to have been made, the parties proceed to the examination of witnesses before the court, or triors, as the case may be. No issue has been joined, and no matter of fact alleged by either party. What is to be tried? It can hardly be determined, in such a state of things, whether the question is one of fact or of law, and the proceeding is obviously inconvenient and irregular. Challenges for principal cause may become part and parcel of the record, and should, therefore, be made in due form. They may be demurred to, and unless some cause, sufficient of itself to raise the

legal presumption of unindifference is alleged, the challenge must, of course, be overruled. But the opposite party is not bound to demur. He may take issue on the facts stated as ground for the challenge, or may counterplead new matter in avoidance. Thus an issue of fact may be joined, which must be decided on the evidence to be adduced by the respective parties. By pursuing the orderly mode of requiring the challenger to specify the grounds of his challenge, and the opposite party to demur, take issue, or counterplead, questions of law and fact will be kept distinct; and, as I apprehend, the convenience of the parties, as well as that of the court, will be greatly promoted. The case of *Man* v. *Glover* has not been referred to as containing any new doctrine, but because it presents a terse summary of the law on this subject. All challenges, except such as may be made peremptorily, are for cause; and unless some cause is stated by the challenger, the objection cannot justly be called a challenge, nor should it be regarded as such.

The bill of exceptions does not show in terms what cause of challenge was alleged against the juror Beach. It is only said he was challenged "for principal cause." But from the scope and character of the evidence given to maintain the challenge, the inference is plain that it was alleged the juror had formed and expressed an opinion that the prisoner was guilty of the crime for which he stood indicted. This was good cause of principal challenge, as has repeatedly been held by this court. *Ex parte Vermilyea*, (6 Cow. 555; 7 Id. 103.) *The People* v. *Mather*, (4 Wend. 229); see also *Mann* v. *Glover*, *supra*; *The State* v. *Benton*, (2 Dev. & B. 196); *Irvine* v. *Kean*, (14 S. & R. 292); *The Commonwealth* v. *Lesher*, (17 Id. 155.) We must then understand this cause of challenge to have been alleged; and as evidence was gone into, the fact must have been expressly or virtually denied by the public prosecutor. An issue was then given to be tried by the court; and if the fact alleged was found to be true, the juror was necessarily excluded. Every challenge for principal cause, must be for some matter which imports absolute bias or favor, and leaves nothing for the discretion of the court. The truth of the fact alleged, and that alone, is in question. Its sufficiency, as ground of challenge, is conceded by omitting to demur and taking issue on the fact. It is otherwise on a challenge to the favor. They must be determined by triors, who are to pass upon the question of actual bias or favor. They are final judges upon the matter submitted to them, and from their decision, when properly instructed, the law has provided no appeal.

The challenge of the juror Beach, for principal cause, was not, in my opinion, sustained by the evidence, and was correctly overruled. He had only an impression that the prisoner was guilty, but nothing which deserved to be called an absolute opinion. He had doubts of the prisoner's guilt, and as far as any opinion had been formed, it was contingent and hypothetical. Such impressions or opinions fall short of what is required to maintain a challenge for principal cause. *The People* v. *Bodine*, (1 Denio, 281, 306); *The People* v. *Mather*, (4 Wend. 243, and cases there cited); *Mann* v. *Glover*, *supra*; *Irvine* v. *Lumberman's Bank*, (2 W. & S. 190, 202.) The challenge for principal cause, having been overruled, or in other words, found not to be sustained by the evidence given in its support, this juror was challenged to the favor; and the question of his indifference was submitted to triors on the same evidence which had been given to the court, on the trial of the challenge for principal cause. As the bill of exceptions states, the court charged the triors the same as in the case of the juror Taylor, to which charge and every part and portion thereof, the counsel for the prisoner excepted.

In the case of the juror Taylor, evidence was given tending to show that he had decided impressions against the prisoner, and a pretty strong belief of his guilt; and in the case of Beach, the evidence, although less decisive, was of the same character. The court charged the triors in the case of the juror Taylor, among other things, that the resort to the triors by the prisoner's counsel was in the nature of an appeal from the opinion of the court on the facts, and that a hypothetical opinion formed by the juror did not disqualify him. These points were distinctly stated in the charge. and as it seems to me are plainly reached by the exception as taken. The charge embraced several distinct propositions, amongst which were those I have stated; and although a separate and formal exception was not pointed at each of these positions as laid down by the court, the exception as taken, was in my opinion fully sufficient to apprize the court and the counsel of what was intended. In terms, the exception extended to "every part" and "portion" of the charge, which would seem to be sufficient to make every distinct position of law which had been laid down by the court. At all events, in a capital case, where it is obvious that the court regarded the exception, as stated, fully sufficient for the occasion, I do not feel at liberty to overlook it as deficient in the requisite degree of certainty.

Then, as to the legal positions laid down by the court, and which have been already stated, it seems to me they cannot be main-

tained. I would not be understood to hold that a hypothetical opinion necessarily disqualifies a juror. It clearly does not. If such was its effect, it would uphold a challenge for principal cause, which it will not. Still it is some evidence of bias, and upon which triors, in their discretion, may set a juror aside; (*The People* v. *Bodine*, *supra*.) The court should not instruct them as matter of law, as was done in this case, that such an opinion does not disqualify a juror; for this, in effect, is charging them that he cannot be set aside on that ground. If the triors find that bias actually exists in the mind of the juror, although it is proved only by the formation of a hypothetical opinion, they may and ought to reject him. Some minds are so constituted that such an opinion would exert a controlling influence in the jury box, while with others, its influence would be neither seen nor felt. All this is to be considered and passed upon by the triors. No rule can be laid down which will enable them in every case to determine with unerring certainty that the juror is or is not indifferent between the parties. It is not a question to be solved by a rule of law, but by the common sense of the triors; and if this has fair play, the difficulty will rarely be found very great. The triors must find that the juror stands impartial and indifferent, or they should reject him. It is the province of the court to say what evidence is admissible on the question of indifference; but its strength and influence in establishing the allegation of bias or favor, are for the triors alone to determine. The court erred in instructing these triors that the juror could not be found unindifferent on evidence that he had formed a hypothetical opinion of the guilt of the prisoner. The instruction should have been that this was evidence to be considered by the triors, and if it convinced them that actual bias existed, the juror ought to be excluded; but if his mind was, notwithstanding, found to be impartial and unbiased, the objection should be disregarded.

I know of no sense in which a resort to triors by a challenge to the favor can be rightly regarded as an appeal from the decision of the court, on a challenge for principal cause. The latter species of challenge is allowed on some ground from which the law infers partiality or bias; and where the fact is put in issue, the court has only to find whether it is true or not. If true, the law adjudges unindifference, and the juror is necessarily excluded. The court is not to pass upon the question of actual bias — but simply to ascertain the truth of the alleged cause of challenge; for if that is true, it follows that the juror is unindifferent. But on a challenge for favor, no such isolated question is presented to the triors. They

are first to inquire whether the alleged cause or ground of challenge is true in fact. But this is not all; for supposing its truth to be established, they must then pass upon the effect it has produced upon the mind of the juror, and find whether the consequence has been actual bias or favor. The triors must come to this conclusion before they can exclude a juror on a challenge to the juror. But as no such question is to be decided by the court, on a challenge for principal cause, the charge in this case, that the resort to the triors was an appeal from the decision of the court, was erroneous. Besides, the tendency of such a charge must be to prejudice the prisoner on the question to be decided by the triors; for it virtually places them in the position of persons sitting in judgment on what had immediately before been determined by the court. It should never be lost sight of, that triors are to ascertain the real state of the mind of the juror, to determine whether he is truly impartial and indifferent between the parties, without favor or bias as to either; and that all the evidence given is only allowable as material to enable the triors to come to this result. On this part of the case my opinion is, that there was error in the instructions to the triors, for which the judgment should be reversed and a new trial ordered.

I proceed to another class of questions made by the prisoner's counsel. The verdict on the preliminary issue was rendered on the sixth of July. In the course of the trial, and shortly after the fifteenth of that month, several medical witnesses were sworn and examined on the part of the prisoner, with a view to establish his insanity the preceding March, when the alleged murder was perpetrated. One of these witnesses, Dr. Van Epps, had known the prisoner from childhood, and had visited and examined him with a view to ascertain his mental condition, both before and after the sixth of July. The others had never seen the prisoner until the fifteenth of July, but they also had examined him on and after that day, in order to be prepared to express an opinion on the question of his sanity or insanity.

That part of the bill of exceptions which states the questions made and exceptions taken in regard to these witnesses, is perhaps liable to some misrepresentation; and it may be that I have not rightly understood what was intended to be decided by the court. I have read this part of the bill of exceptions repeatedly, with an anxious desire to collect its true meaning; and although I would not affirm positively that its meaning may not have been misapprehended, I still think no error has been fallen into in regard to the views of the court. As I understand the bill of exceptions, the court held that

it was competent for these or other medical witnesses to express an opinion upon the question of the insanity of the prisoner at the time of the alleged murder; but that such opinion must be formed upon facts and circumstances which occurred or observations made before the sixth of July, when the verdict on the preliminary issue was rendered; and could in no degree rest upon anything observed in the appearance, manner or condition of the prisoner since that time; that the witnesses could not, with a view to fortify the conclusion of insanity at the time of the homicide, be allowed to express an opinion that he was insane at the trial, or had been at any time since the sixth of July; nor was it even allowable to say they had examined the prisoner since that time with a view to ascertain his mental condition. These restrictions were deemed proper by the court, as I gather from the bill of exceptions, on the ground that the verdict on the preliminary issue had conclusively established, for all purposes connected with this trial, the sanity of the prisoner at the time when that verdict was rendered. I cannot adopt the suggestion made on the argument, that the sixth of July may have been taken as a reasonable time by which to bound the inquiries made of these witnesses. On the contrary, it is quite clear that the court regarded the preliminary verdict as decisive of the question of present insanity, and therefore limited the witnesses to the time when that verdict was rendered. In giving reasons for his opinion that the prisoner was insane, Doctor Van Epps spoke of an interview with him since the sixth of July, when he "was stopped by the court, who then remarked (an objection having been made by the counsel for the People) that the question of present sanity had been tried and verdict rendered on the sixth of July instant, and that the question of the present sanity could not be then again re-tried;" that the question now was as to the sanity of the prisoner when the deed was done, the preceding March, "and that the evidence of insanity must be confined to facts before and at the time of committing the act, and up to the sixth of July instant, when the verdict of sanity was rendered."

Doctor Hun, another of these witnesses, had first seen the prisoner on the 15th day of July. The prisoner's counsel "proposed to prove by this witness, that in his opinion the prisoner is and was insane at the time of the commission of the crime." This was objected to by the counsel for the people, on the ground that the verdict on the preliminary issue, rendered on the sixth day of July instant, was and is conclusive that the prisoner was sane on that day, and that the same cannot be contradicted by evidence. The court did not pass directly upon this offer and objection,

although the ground stated by the counsel for the people is understood to have been precisely that which the court acted upon. This witness was asked if he had made a personal examination of the prisoner since his arrival at the court, which was on the 15th day of July, "with reference to the state of his mind." To this the counsel for the people objected, and the court refused to allow the witness to give an answer. He was then asked if it was his opinion, founded upon personal examination since the 6th day of July, that the prisoner was insane on the 12th of March, when the homicide was perpetrated. This was objected to by the counsel for the people, and the court sustained the objection. The witness was then asked his opinion, founded on such examination, as to the prisoner's being insane at the time when the question was put. This was also objected to and excluded by the court. Doctor McNaughton was examined under like restrictions. "The court decided that the witness should not testify as to any examination made by him of the prisoner since the 6th day of July instant," and particularly "instructed the witness that he should, in any future testimony to be given by him, upon the trial of this cause, exclude all knowledge or information gained by him of or about the prisoner, since the said 6th day of July instant." These references to points decided and views expressed by the court clearly show, in my opinion, that the court regarded the preliminary verdict as absolutely conclusive for all purposes in this case, that the prisoner, on and after the 6th of July, was in a sane state.

The views of the court upon this part of the case were in my opinion clearly erroneous. In strictness the verdict on the preliminary issue was not before the court and jury on the trial of the issue of guilty or not guilty — nor was it in any respect material to such trial. But if it should be regarded as a fact in the case, of which the court and jury, while engaged in the trial of the main issue, might take notice, no such consequence as that deduced by the court would follow from it. The only object of the preliminary trial was to ascertain the mental condition of the prisoner, in order to determine whether he should be tried on the indictment. This, I repeat, was the only object of that trial; and the result at which the first jury arrived could have no possible bearing or just influence upon the trial of the main issue. The indictment was not to be tried piecemeal, but at one time and by a single jury. If, therefore, the opinion sought to be obtained from these medical witnesses was otherwise competent and proper, (and that seems to have been conceded) it is perfectly clear that the preliminary verdict constituted no obstacle to its reception.

I am not about to inquire how far or under what circumstances medical witnesses may be admissible on the question of insanity, although in general nothing is better settled than that such evidence is competent. (1 Phil. Ev. 290; Shelf. on Lun. 62, 67, 73; 1 Greenl. Ev. § 440.) And I entertain no doubt that such a witness should be allowed to express an opinion in regard to the mental condition of a person alleged to be insane, in the month of March, although the opinion may have been founded solely on an examination made in the succeeding July. In most cases, undoubtedly, the opinion would be more satisfactory and convincing, when based on observations made at or about the time to which the inquiry relates. But it was not decisive against the reception of such evidence, though founded on examinations made at a later period. The competency of the testimony is one question, and its effect another. The first is for the court, and the latter for the jury. It will sometimes undoubtedly be found, and perhaps not unfrequently, that the mental malady is such that an examination would disclose, beyond all peradventure, to a skilful physician, what must have been the condition of the patient for months or years before. The lateness of the time when the examination was made, as well as the character of the malady, are certainly to be considered in determining the degree of consequence which should be given to the opinion of the witness; but unless the intervening time is much greater than from March to July, that can furnish no solid objection to the admission of the evidence. If I could therefore adopt the suggestion that the 6th of July was adopted by the court as a reasonable limitation to inquiries of this description, I should still be unable to agree that the court had a right to impose any such restriction upon the witnesses. It was competent for such witnesses to state what their opinions were, whether founded on examinations before or during the trial; and those opinions might not only extend to the mental condition of the prisoner, at the time when the homicide was perpetrated, but they might be brought down to the very time when the witness was speaking. The latter would be admissible, not because the present insanity of the prisoner would necessarily control the verdict, but because it tended to fortify the conclusion that insanity existed in the preceding March. But although such are my views upon this part of the case, it is not supposed that the court excluded the evidence of the opinion of these witnesses, in consequence of the lateness of the period when their examination had been made. The evidence was shut out, as I understand the case, because the verdict on the preliminary issue was supposed to constitute an insuperable bar to its reception. This, as I before said,

was, in my judgment, erroneous. Upon the whole case, therefore, I think the judgment of the court below should be reversed, and a new trial ordered.

Whether the prisoner was or was not insane at the time of the homicide, or the trial, is not a question before us on this bill of exceptions, and no opinion on that subject is intended to be expressed or intimated.

Judgment reversed.

Circuit Court of the United States, Massachusetts District, April Term, 1847, at Boston.

SAMUEL J. FOSTER ET AL. *v.* JOHN H. SWASEY.

Equity; — Costs; — Jurisdiction of the United States Courts; — Practice; — Fraud; — Agency; — Contracts.

THIS was a suit in equity. The bill stated, that on or about the fifth day of August, in the year 1842, the said John H. Swasey became possessed of a certain promissory note, dated Brighton, July 23d, 1842, for the sum of nine hundred and ten dollars, drawn by M. M. Rice, payable to Edmund Rice, or order, at the Suffolk Bank in Boston, in four months, and by the said Edmund indorsed in blank. That, on or about the fifth day of August, in the year 1842, the said Swasey sent a copy of the said note to Bangor, to one Timothy George, accompanied by the following letter: — "*Timothy George*, Esq. Dear Sir: I have the note in my pocket, the copy of which is above. I want you to purchase for me a cargo of boards of the best quality, and pay for them with the above note. You have a plenty of folks in Bangor who well know the old man Rice, and if they do, will be glad to sell boards and take his note. This note is young Rice's promise, with his father's indorsement. Old Veazie, I think, would be glad to sell boards for it. Bragg & St. Clair would be good references, I think, as he knows them well enough to sell boards, and I think the note good. Edward D. Peters has said, the note he thought good, and I well know he has trusted on the strength of the old man's name very lately. Any way, I have got the note in the way of trade, and will sell it for boards, as I can get the money sooner than wait for the note to fall due. If it requires three or four hundred dollars to

put with it, do so, and send me a bill of lading, and draw as long as you can, if it is not more than ten days. I want you to attend to this immediately, as I can sell the boards now better than late in the season. If you can buy the boards, buy them, and send for the note, and I will forward the same. You will please keep this to yourself. Let no one know who wants the boards. If you do this business for me, I will pay you five per cent. for buying. George, be on hand, and if you write, write yourself; don't get any one to do it for you; although it is no particular matter. I shall expect to hear from you very soon. Write to me. Yours in haste, *John H. Swasey.* Boston, August 5, 1842."

That immediately after the receipt of the said letter, the said George applied to the plaintiffs, (who were copartners in the lumber business, in the said Bangor,) for the purchase of a cargo of lumber; that he described the said note to the plaintiffs, and represented to them that the parties to it were good and able to pay it, and proposed that the plaintiffs should take the note as so much towards the payment of the lumber; that the plaintiffs, fully believing, from the representations of George, that the note was good, and would be promptly paid by the parties to it, at its maturity, and having no knowledge of the responsibility of the parties to the said note, except what they obtained from George, agreed to sell to him a cargo of lumber, and accept the note as part payment therefor; and thereupon they delivered to George a cargo of lumber, and George wrote to the said Swasey, and obtained the said note, and delivered it to them; that George then shipped the lumber to Swasey, and gave a draft on Swasey for the balance due for the lumber; that Swasey received the said lumber, and sold it, and appropriated the proceeds to his own use; that the said George did not exhibit the said letter of the said Swasey to the plaintiffs, nor did he represent to them that he was buying the lumber for Swasey; nor did they then know that Swasey was in any way interested in the said purchase. That the said note, at its maturity, was regularly protested for non-payment, and due notice thereof given to the indorser, and is still unpaid; that the note was drawn and indorsed without any consideration being paid therefor, either by Swasey, or by any other person, and that Swasey paid no consideration for it; and that the drawer and indorser of the note were, at the time of its date, and ever since had been, totally worthless and unable to pay the same; and that the said Swasey, at the time he sent a copy of the note to George, well knew the same to be worthless, and that neither the drawer nor indorser of the note was possessed of property wherewith to pay

the same, and that it would not be paid. And the bill charged that Swasey, by thus selling the note to the plaintiffs, committed a gross fraud on them, and that he ought, in equity, to pay to the plaintiffs the whole amount of the said note, with interest and damages thereon.

The bill prayed for discovery and relief. The answer denied the allegations of fraud. There was much conflicting evidence.

Theophilus P. Chandler, for the plaintiff.
William C. Aylwin and *C. C. Paine*, for the defendants.

Woodbury, J., in delivering judgment in favor of the plaintiffs, decided the following points: (1.) A complainant in chancery, residing in another state, but in the same circuit, cannot be required to furnish security for costs, except at the first term. (2.) When redress is sought in chancery, it cannot be granted in the courts of the United States, however it may be in England or in the States, if the redress is in every way as full and appropriate at law. (3.) The objection may be taken on demurrer, when it appears on the face of the bill; but is not too late at the hearing, if, after an answer, no disclosure is obtained. (4.) An averment of fraud in the sale of a promissory note, and a request for a discovery of facts accompanying the sale, furnish sufficient ground for jurisdiction in chancery. And the proceedings once properly begun, these will be continued; when important facts are thus disclosed, and the subject in controversy is one proper for chancery, as well as a court of law. (5.) An expression of a belief by the vendor of the note, that the maker is responsible, is equivalent to an assertion that he is so, if meant to be so understood, and if made with the knowledge that he was not responsible. (6.) Where the vendor receives valuable property for such note, and no payment is made for part of the price except by the note, the owner of the property is entitled to recover that part, or damages equal to it, if the signer of the note was worthless, and so known to be by the vendor of the note. (7.) A special agent has no power to go beyond what is confided to him in making a trade, so as to bind his principal by any contract he thus makes, but is liable for it himself. (8.) Yet a contract made by such an agent by means of false and fraudulent assertions is void, and may be rescinded, or damages given, in a suit against the principal, if the latter received the benefits and proceeds of it. (9.) *Quære*, if notes are sold which are worthless, and the purchaser does not specially agree to take the risk, whether he may not recover the consideration paid for them.

A decree was accordingly entered, that the defendant should pay the complainants the amount of the note and interest, and that, upon such payment, the note should be delivered up to the defendant.

JOHN TAYLOR AND ANOTHER *v.* DANIEL CARPENTER.

New trial; — Division of opinion; — Evidence; — Exemplified copy of a judgment; — Account of sales; — Usage; — Delay to prosecute; — Right of alien friend to sue; — Action of deceit for using trade marks; — Fraud; — Damages; — Reciprocity of remedies; — Patent Laws.

THIS was an action upon the case, brought by Messrs. J. & W. Taylor, manufacturers of spool cotton, called Taylor's Persian Thread, at Leicester, England, against the defendant, a manufacturer at Foxborough, Mass., for deceit in using the plaintiff's marks on the defendant's goods, and selling his own thread with labels in imitation of the plaintiff's labels affixed to them, and as and for the plaintiffs'. The plaintiffs had previously brought a suit in equity for an injunction against the defendant, and an injunction was thereupon granted by the late Mr. Justice Story, (7 Law Reporter, 537.) The present case was tried in December, 1844, before Judge Sprague, and various rulings were made at the trial, which were excepted to by the defendant. A verdict was rendered for the plaintiff for $800, and the case was afterwards argued upon the exceptions, and a motion for a new trial.

An opinion was delivered by WOODBURY, J., refusing a new trial, in which the following points were decided: 1. The judges of this court, on a motion for a new trial, cannot certify to a division of opinion at the trial itself, unless both were present; and it will not enable the parties to carry the case up, if certifying to it in respect to the motion for a new trial. 2. A document, attested by the clerk of a court, with its seal and the certificate of its presiding judge, and called an exemplified copy, is competent evidence of the judgment, described in it, under the act of congress, though it may not conform to the mode at common law or in the state where the judgment was rendered. The force and effect of the judgment itself, and not of the copy, depend on other principles. 3. A witness may testify generally as to what accounts and results of sales were rendered to him, without their being produced, but he cannot give their respective contents without producing them if

called for. 4. When an action is brought for a deceit in using the plaintiffs' marks on the defendant's goods, and selling goods of the defendant with the plaintiffs' marks on them, and as and for the plaintiffs', evidence may be offered of any number of such sales, under a count for selling on a particular day, and divers other days between that and the date of the writ. 5. Evidence in such a case of a usage abroad and in England to use such marks of others with impunity, when aliens, is not a competent defence to the jury. 6. Nor can such a usage, being a bad one, and not existing here, affect the law here. 7. It might be offered in mitigation of damages, if requested; and a long delay of the plaintiff to prosecute, after knowing the wrong, might be competent proof to show his acquiescence in it, but could be no absolute bar to his recovery, unless extending to the period of the statute of limitations. 8. An alien friend can bring here, when injured, any personal action, which a citizen can. 9. And though he is not admitted to some political and municipal rights, which citizens are entitled to, the protection of his person and property against frauds and wrongs is due and is just. 10. When the marks to his goods are used by others, and sold by them on their goods as and for his, it is a wrong, and he is entitled to recover to the extent of his damages by the loss of sales and their profits. 11. He is entitled to that extent, though the articles sold as and for his were not inferior in quality. 12. It is not a bar to such a suit, that a remedy is not reciprocally allowed like this to aliens in the country to which he belongs. 13. Nor is the remedy in this case obliged to be prosecuted by taking out a patent for his marks under the Patent Laws. 14. Laws and pleas are to be construed more favorably to alien friends than formerly, when a low state of commercial intercourse and of civilization regarded almost all foreigners as barbarians, if not enemies. 15. The damages in such cases should be full and ample, but not vindictive, or beyond what has been really suffered; and if the language used by the judge was "exemplary damages," and open to be construed beyond this rule, yet if the jury appear not to have gone beyond the actual injury sustained, the verdict will not be disturbed.

B. R. Curtis, for the plaintiff.
Rufus Choate, and *Silas F. Plimpton*, for the defendants.

Digest of American Cases.

Selections from 3 Story's (United States Circuit Court) Reports.

ADMINISTRATOR.

1. Where a bill was brought by the plaintiff as administrator, and the defendant pleaded, that he was not administrator, inasmuch as he had not taken out administration in New Hampshire before filing this bill — *It was held*, that the plea was sufficient on general principles, and also that the statute of New Hampshire in relation to actions commenced by persons acting as administrators did not govern the rule of this court in equity, but was confined to suits at law, and was addressed only to the state courts. *Carter* v. *Treadwell*, 25.

2. *Held*, also, that the plaintiff might maintain a suit in the circuit court as a citizen of Maine, in his character of administrator, if he took out letters of administration in New Hampshire. *Ib.*

AGENCY.

1. Where a sale made by an agent is ratified by his principals, the agent's representations, made at the time of the sale, bind his principals. *Doggett* v. *Emerson*, 700.

2. Where A. and B. gave a bond to C., conditioned to make a conveyance of certain timber land, provided C. should elect to buy the same on certain terms, within thirty days,—or should make a sale thereof within the same time, in which case, only one half of the excess over a certain price was to be paid to A. and B., — and C. did make sale of the land, and A. and B. received one half of the excess of the price over the stated sum, and made a deed of conveyance thereof to the purchaser,— *It was held*, that C. was the agent of A. and B. in the sale, and they were bound by his representations. *Hough* v. *Richardson*, 659.

3. Whatever is known to an agent is, in contemplation of law, known to the principal, and the latter cannot aver his ignorance thereof. *Ib.*

4. In general, sub-agents, acting *ex contractu*, are responsible only to the immediate agents who employ them, and not to the principals of such agents ; and there is no necessary exception to this rule in the case of public officers, although, under particular circumstances, an exception may arise. *Trafton* v. *Bright*, 646.

5. A court of equity will not maintain a bill for redress in cases of loss or injury occurring to a principal from the negligence or misconduct of his agent. The appropriate remedy is at law for damages. *Vose* v. *Philbrook*, 336.

ALIENS.

In the courts of the United States, alien friends are entitled to claim the same portion of their rights, as citizens. *Taylor* v. *Carpenter*, 458.

APPEAL.

In cases of appeal from the district court, this court is very cautious in admitting new matters of defence or allegation to be introduced, where the facts, on which they rest, are not new or newly discovered, but were perfectly known at or before the hearing in the district court. *Coffin* v. *Jenkins*, 109.

ASSIGNMENT.

1. A. made an assignment of all his property to B., C., D., and E., in trust, to pay his debts. Among the property assigned was a large debt from Messrs. F. and M., on which an action was brought, and judgment recovered, and execution levied by selling an equity of redemption in the Folsom Farm, mortgaged to the Granite Bank, but owned by F. and M. This equity

was purchased by B., one of the assignees, and subsequently sold to the defendant, Smith, Jr., the latter mortgaging the property to B., to secure his notes for the purchase-money. B. conveyed the mortgage and two of the notes, to the defendant Rice, for a debt due to B. from Goddard, of whom Rice was administrator. The mortgage held by the Granite Bank was subsequently conveyed to the defendant, Smith, Jr., and, at the time of the filing of the bill, was foreclosed. The present bill was brought by one of the assignees to enable the assignees to obtain a decree for the redemption of the Folsom Farm, as against Smith, Jr., and as against Rice, to obtain a surrender of the mortgage and notes, — and charged that the conveyance to B. was made to him as assignee, and not in his own right; —

2. *It was held*, that, as no deed from the sheriff, conveying the equity of redemption to the assignees, appeared, and its absence was not accounted for, but the only deed shown was to B., alone, who declared that he bought on his own account; and as the assignees had acquiesced in the possession and foreclosure of the mortgage by him, without objection; it must be considered as belonging personally to B., — the *onus probandi* being on the plaintiff to show the contrary, which he failed to do. *Cushing* v. *Smith*, 556.

3. *Held*, *also*, that, under the circumstances of the case, Smith, Jr., was a *bona fide* purchaser, without notice of any equity on the part of the assignee; and that his title was completely established by the foreclosure of the mortgage, under the requirements of the statutes of New Hampshire. *Ib.*

4. *Held*, *also*, that the plaintiff could not, in the argument, take advantage of the objection, that the publication in the newspaper of an intention to foreclose, as required by the statute, was not established by any copy of the newspaper, but only by two witnesses; but that the objection should have been made at an earlier period; or the *prima facie* evidence of the witnesses should have been disproved. *Ib.*

5. Where denials to allegations in the bill are made in the answer, the *onus probandi* is on the plaintiff to overcome such denials by the testimony of two witnesses, or of one witness and other corroborative facts. *Ib.*

ATTACHMENT.

1. The United States have no such priority over other creditors of their debtors, as to entitle them to a prior satisfaction, by attachment and levy, over prior attaching creditors. *United States* v. *Canal Bank*, 79.

2. In Massachusetts and Maine, a creditor, attaching real estate, can hold the same against a person purchasing prior to the attachment, but whose deed is not recorded until after the attachment; provided the attaching creditor has no notice of the deed, at the time of the attachment. *Ib.*

3. The United States, by attachment and levy of execution upon real estate, do not acquire any better title to the same, than the debtor himself had. *Ib.*

4. B. attached certain land, as the property of C., on October 4, 1839, and levied an execution thereon, on November 11, 1840. C. conveyed the same land to H. by deed, prior to the attachment, but the deed was not recorded until October 26, 1839, and B. had no notice thereof, prior to that time. The United States recovered judgment against C. and H. on duty bonds, subsequent to October, 1839, and levied their execution on the same premises prior to November 11, 1840, "as the estate of any or all the debtors." *It was held*, that the United States were not entitled to a priority against B. *Ib.*

5. An attachment on mesne process, is not a lien in the sense of the common law.

AUCTION SALE.

1. When, at an auction sale, all the bidders, except the purchaser, are by-bidders secretly employed by the seller, and the judgment of the purchaser is improperly influenced by their bids, the sale is a fraud, against which equity will relieve the purchaser. But when there are real bidders, as well as sham bidders, and the last bid before the purchaser's is a real bid, and the judgment of the real bidders and the purchaser has not been blinded by the sham bidders, the sale is valid. *Veazie* v. *Williams*, 612.

2. A release of all liability in the premises having been executed by the plaintiff to the auctioneer, — *It was held* that it was a release of his principals, the defendants. *Ibid.*

Notices of New Books.

A New Law Dictionary, containing explanations of such technical terms and phrases as occur in the works of legal authors, in the practice of the Courts, and in the Parliamentary proceedings of the Houses of Lords and Commons; to which is added an Outline of an Action at Law and a Suit in Equity. By Henry James Holthouse, Esq., of the Inner Temple, Special Pleader. Edited, from the second and enlarged London edition, with numerous Additions, by Henry Penington, of the Philadelphia Bar. Philadelphia: Lea & Blanchard, 1847.

"He that undertakes to compile a dictionary, undertakes that, which, if it comprehends the full extent of his design, he knows himself unable to perform. Yet his labors, though deficient, may be useful; and with the hope of this inferior praise, he must incite his activity and solace his weariness."

These are the words of Dr. Johnson. They are applicable to all makers of Dictionaries,—whether of languages, or of terms of art and professional knowledge. Most certainly they are true of the makers of Dictionaries of jurisprudence, from Giles Jacobs, immortalized as that "blunderbuss of law," down to our present author. Dr. Johnson spoke the truth also, when he defined a lexicographer as a "harmless drudge;" but he did not tell the whole truth. He must have learning, judgment and industry, in the department to which he is devoted. Undertaking to lead others, he must have the qualities of a leader on his walk.

It would be wrong not to speak of Mr. Holthouse's labors with respect. It would be fulsome to award them high praise. They are satisfactory. They comply with the moderate requisites of the class of works to which they belong. To students and beginners his book will be instructive. But we should commend them rather to the large depositories of knowledge. To Tomlins's Dictionary may be applied those phrases of the civilian, *Oceanus Juris*, and *Thesaurus Juris;* and we believe a faithful student may profit by plunging at once into its ample pages. Mr. Holthouse's Dictionary will be valuable to persons out of the profession—"lay gents," as they are called by early writers—who wish to understand the nomenclature of the law, and would only dip as with a swallow's wing into its vast "ocean." They may refer to his definitions with confidence.

But let us say again, what we have often said before, there is no "short cut" to knowledge in the law. It can be accomplished only by strenuous labor, and though we gladly hail every fresh help, yet we would not encourage beginners with the hope to be learned without study, nor our unprofessional friends, with the premature aspiration that every man may be his own lawyer.

Fourth Annual Report of the Managers of the State Lunatic Asylum, New York. Made to the Legislature, Feb. 2, 1847. Albany, 1847.

This report is by Dr. Brigham, whose views on all questions connected with Insanity, are entitled to peculiar respect. He has reviewed with much discrimination several recent opinions of courts, among which are those of Shaw, C. J., in Massachusetts, in the trial of Rogers;

of Williams, C. J., in Connecticut, in the trial of Woodford; and of Hornblower, C. J., in New Jersey, in the trial of Spencer. In reply to the common remark that the defence of insanity is too frequently made, and, by means of it, persons are improperly acquitted, the author of this report makes the following statement: "We do not believe that a solitary instance can be adduced, either in this State or in either of the New England States, where a homicide has been committed, and the plea of insanity interposed and supported by the evidence of a physician well acquainted with insanity, and been acquitted on that ground, that time has not shown the defence and acquittal to have been correct. We hope, if this assertion cannot be contradicted by facts, and that it cannot we are confident, that it will tend to quiet the alarm of those who are fearful that the defence of insanity is too frequently successful. But can it be said on the other side that the plea of insanity has never been improperly rejected? We apprehend not. Many instances occur to our minds of persons having been condemned to the gallows in this country, for crimes committed when, according to the present general opinion, they were insane. We need but refer to Goss, who was executed in Connecticut, Prescott, in New Hampshire, Cook, in Schenectady, Baker, in Kentucky; to which we may add Cornell, of Chautauque county, and Wilcox, of Saratoga, in this state, who were condemned to be hung, but the evidence of their insanity was such as to induce the Governor of the state to commute their sentences into imprisonment for life in the state prison. Cornell's sentence was thus commuted by Governor Bouck, and he is now in Auburn prison. The physician of the prison, who has seen much of him, informed us the last summer, that in his opinion Cornell is insane, and we came to the same conclusion on seeing and conversing with him. Wilcox, whose sentence was commuted by Governor Wright, is at Clinton prison, and of his mental condition now we know nothing, but judging from the evidence adduced on the trial, as published, we think there cannot be much doubt but that he was insane when he committed the homicide."

New Books Received.—Reports of Cases argued and determined in the High Court of Chancery, during the time of Lord Chancellor Cottingham. By J. W. Mylne and R. D. Craig, Esqrs., Barristers at Law. With notes and references to both English and American decisions, by John A. Dunlop, Counsellor at Law. Vol. IV. 1838-39-40.—2, 3, and 4 Victoria. New York: Banks, Gould & Co., Law Publishers, 144, Nassau street; Albany: Gould, Banks & Gould. 1846.

Reports of Cases argued and determined in the High Court of Chancery during the time of Lord Chancellor Cottingham. By R. D. Craig and S. J. Phillips, Esqrs., Barristers at Law. With notes and references to both English and American decisions, by John A. Dunlop, Counsellor at Law. 1840-41.—3 and 4 Victoria. New York; Banks, Gould Co., Law Publishers, 144 Nassau street; Albany: Gould, Banks & Gould. 1847.

Reports of Cases argued and determined in the Court of Chancery of the State of New York, before the Hon. Lewis H. Sandford, Vice Chancellor of the First Circuit, while Assistant Vice Chancellor. Vol. II. New York: Published by Banks, Gould & Co., Law Booksellers, No. 144, Nassau street; and by Gould, Banks & Gould, No. 104, State street, Albany. 1847.

Intelligence and Miscellany.

PARDONING CONVICTS TO MAKE THEM WITNESSES. In reading the very able and interesting report of the trial of Abner Rogers, for murder,[1] the following sentences would naturally arrest the attention of any one.

"John P. Reed, called and sworn. (It was agreed that the witness had been *pardoned* by the governor, to render him competent on the part of the prosecution.)"

"Joseph Tully, called and sworn. (This witness, it was agreed, had been *made a competent witness*, on behalf of the government, by pardon.)"

"George H. Savary, called and sworn. (This witness, it was agreed, had received a *pardon, to enable him to testify* on behalf of the prisoner.)"

"William Bevenell, called and sworn. (This witness had been rendered *competent, partly by pardon, and partly by writ of error.*)"

"Bernard Lanber, called. Objected to by the state's attorney, as incompetent, from having been convicted for receiving stolen goods. Record offered, shewing his conviction of that offence, and his commitment to the state prison. The witness was *rejected.*"

"Henry Rochford, called and sworn. Objected to, as having been convicted of petty larceny, in the police court of the city of Boston. Pardon produced by the witness."

Abner Rogers was indicted and tried for the murder of Charles Lincoln, Jr. The law presumes all accused — it presumed him, innocent. The verdict of the jury was in accordance with the presumption of law. One witness, not having received a pardon, was rejected as a witness — not because his testimony might not have been true, and of vital importance to the prisoner — but because he wanted the pardon so necessary to technical competency — so unnecessary to testimonial veracity. Five individuals, guilty of crime, were pardoned, not on account of any good conduct, or any peculiar veracity of their's — but simply to make them competent witnesses for, or against the government.

Convicts, whose guilt was as clearly established as guilt ever can be — justly suffering the penalties imposed by law, were pardoned, that they might be heard as witnesses. A just punishment for an offence committed, was in each instance, remitted. The punishment of innocence — the escape of guilt, are both disastrous. The interests of society are promoted by the infliction of just and appropriate punishment. The remission of a just and fitting punishment, for a cause totally unconnected with the character or conduct of the pardoned convict, is an evil, — great in proportion to the justice of the punishment thus remitted. If that was just, the pardon was unjust — a violation of the will of the legislator. To aid in the conviction of one presumed to be innocent, five known to be guilty and suffering a justly inflicted punishment, were pardoned. Here there is a certain evil — the remission of just punishment, to obtain a contingent good — the just punishment of a possible offender. The certain, yielding to the doubtful. For a chance at those whom you presume innocent, you discharge from punishment those whom you know to be guilty.

To one not learned in the law, the question would naturally arise, why not hear as well without a pardon as with? Why ever pardon? What good does it — to any body — to the convict — to the judge — to the public? These are natural inquiries. Unlearned men cannot understand the matter. Learned men do.

The law excludes those, says Mr. Greenleaf,[2] "who have been guilty of those heinous crimes, which men gen-

[1] For notices of this case, see Law Reporter, Vol. VII., pp. 109, 293, 449.

[2] 1 Greenleaf on Evidence, § 372, and passim.

erally are not found to commit, unless *when so depraved as to be unworthy of credit for truth*. The basis of the rule seems to be, that the witness is morally too corrupt *to be trusted to testify;* so reckless of the *distinction between truth and falsehood*, and insensible to the *restraining force of an oath*, as to render it *extremely improbable that he will speak the truth at all.*" That there are offences which should exclude the witness, seems to be admitted on all hands. Still, "it is a point of *no small difficulty* to determine *precisely*, the crimes which render the perpetrator *thus* infamous." They must, however, be those which imply "such a distinction of moral principle as carries with it a *conclusion* of a total disregard to the obligation of an oath." In other words, the offence must be such an one as will justify the conclusive inference of future from past crime. The law makes this a legal presumption. Were the witness heard and his credibility submitted to the consideration of the jury, all would be right. But such is not the case. A witness is excluded because from the commission of some past offence it is inferred, *conclusively*, that he will commit the offence of perjury. But what and how great is the probability of future from past crime? The offence, whatever it was — perjury, larceny, on account of which the exclusion takes place — however great its moral taint, however atrocious its nature — was committed under the influence of powerful motives then operating on the mind of the culprit. The crime, for the commission of which the criminal is to be excluded, had its deep and all-powerful motives — motives so strong as to overwhelm all moral restraints. But unless some motive or motives of the greatest strength are acting upon the witness, will he commit a second crime? Because one crime has been committed, it by no means follows that the same person will again commit another under the same circumstances — still weaker is the inference, if the circumstances are changed, and every motive point in a contrary direction. Lives there the man, lived there ever the man so corrupt, that he would commit crime without motive? Is it conceivable? Examine then the situation of the witness — the various motives, which may reasonably be presumed as likely to influence his conduct — allow them their fitting and appropriate significance — hear all the evidence that may be offered, touching his character for truth and veracity, and then after you shall have heard it, determine as to the probable truth or falsehood of the testimony — but do not refuse to hear it.

Further, punishment has been imposed and suffered — punishment such as the law, regard being had to prevention and reformation, has adjudged meet and proper; sufficient, it may be presumed, if there be any prevention or reformatory effect in punishment, to prevent the repetition of crime on the part of one, who has once suffered. If not sufficient, it should be increased. If increased indefinitely and no such effect is had, then is the infliction of legal punishment pure and unmixed evil. If the law neither amends by its sufferings, nor prevents by its terrors, it can only be considered as the application of so much physical force, by which, during a given period of time, the criminal is restrained from injury. If the law is of any service, either by way of amendment or prevention, then one who has once endured its penalties, would be less likely to err even to promote his own imagined interests — still less would be disposed to commit crime, when the rights of others are involved.

If, however, any one supposes that this pious horror at crime — this virtuous indignation at guilt, has any meaning — he will find himself sadly mistaken. Mere crime, however atrocious, and however fully admitted, never excludes. With the old Spartans, theft *per se*, was well enough — rather approved than otherwise. The detection it was, which was considered worthy of punishment. So with the common law. The *judgment* it is which excludes. The avowed and unconvicted thief, a perjurer, is a competent witness. The accomplice, testifying under the expectation of pardon — the accomplice as guilty as the accused, whose conviction he is endeavoring to procure, is heard. The guilt in each case the same — associates in crime, the accomplice — with pardon dependent upon his testimony, is received to convict — while the associate, if convicted and sentenced, would not be heard to testify in a cause be-

tween other parties, in which he had no interest. This admission "is justified by the necessity of the case"—as if *any necessity* would justify the admission of those, who had committed crimes, which carried with them "a conclusion of a *total* disregard to the obligations of an oath."

But the judgment, it seems, is not always enough. Neither the crime nor the judgment will exclude, if the conviction shall have taken place in a state, other than that in which the witness is examined. This "insensibility to the obligation of the oath"—this recklesness "of the distinction between truth and falsehood," this moral corruption of the witness, are matters "strictly territorial."[1] This judgment may be shown in diminution of the credit due to his testimony! The same crime is no worse in one state than in another. If the "conclusion of a *total* disregard to the obligations of an oath" is correct in one state, why should it not be in all? If the law be well founded in its inference, why should not the law be altered to give full efficiency to so wise a rule? But if, on the other hand, the evidence of admitted criminals—the evidence of convicts from other states, have been and can be received without danger, their crime being "shown in diminution of the credit due them," what reason is there why the law cannot be safely changed, and all convicts be admitted subject to such deductions from the weight of their testimony, as in each instance, a jury may consider proper?

This taint, it seems, may be removed, and a way be found by which the convict may be heard as well as the unconvicted accomplice. This "disability" may be removed by means of a pardon under the *great seal*. This disability it must be remembered, arises from recklessness of "the distinction between truth and falsehood" and insensibility "to the restraining force of an oath." A lesser seal will not answer the purpose. The great seal in its moral efficacy, resembles the royal touch in its healing virtues; the one cleanses from sin—the other from disease. In England, the chancellor is the keeper of the great seal and the king's conscience. By the revolution, we lost the benefit of the chancellor's great seal, but we have contrived to get up various great seals, and the number is on the increase, which have been found to answer the purpose just as well. But the royal touch is irrecoverably gone. Nothing has been discovered to supply its place.

It was enacted in England,[2] that enduring the punishment, to which an offender had been sentenced, for any felony not punishable with death, has the same effect as a pardon under the *great seal*, for the same offence. In the opinion of men learned in the law, this is all wrong—punishment, in its reformatory or preventive effects, being in no respect equal to the great seal.[3]

But what is the effect of the pardon? Does the great seal remove "this presumed total disregard to an oath"? Does it confer sensibility to its obligations? Why, in the case which has been before referred to, was a pardon granted to five justly condemned convicts? Did the governor believe it would make them any better? Did he imagine it would alter in the slightest degree their testimony? Did the seal change the evidence, which these convicts would have delivered, from falsehood to truth? If so what was the mode of its operation? Cannot legislative wisdom devise some mode by which the virtues of the great seal as a "sovran remedy" for falsehood may be further extended? Is neither the testimony of the witness changed nor his trustworthiness increased by the pardon? Then of what conceivable benefit is it? Is the sagacity of the judge or jury enlarged? If not, if no effects ensue from this mummery, if the trustworthiness of the witness is not increased, nor the capacity of the judge enlarged, then all that has been accomplished, is that criminals expiating their offences by suffering the appointed punishment, have been thrown loose on society; justice has been defrauded of her due—and nothing has been gained, for the witness might just as well have been heard without the pardon as with, leaving it to the jury to place such reliance on his testimony, as under all the circumstances of the case, they shall think it deserves. If the jury

[1] 1 Greenl. on Ev. § 376.

[2] Stat. 9 Geo. 4, c. 32, § 3.

[3] 1 Phil. and Am. on Ev. 25.

are competent to judge of the veracity of a pardoned convict, would they be at fault to determine that of an *unpardoned* convict? The *great seal* would make *all* the difference in the cases.

The truth is, the pardon is a silly device to avoid the effects of a bad rule. The right way is to abolish the rule, as has been done in England. The rule is full of evil, and that continually, without a particle of alleviating good. Important witnesses are thus shut out. Important witnesses, we say, for it does not depend upon a man's integrity, that his testimony should be received; nor is it in the power of any one to determine who shall be his witnesses; for he may not know in advance, that proof will ever be needed. Experience has shown that no evil has ensued from the admission of accomplices, and of those who have been pardoned; and if none in those cases, there can be none in any. The pardon for the purpose of restoring competency, is pure and unalloyed and unnecessary evil. Justice is defeated. The law is *pro tanto* repealed, and the veracity of the witness not thereby increased.

Insolvent Law. Since the insolvent law of Massachusetts was enacted, in 1838, experience has shown various defects in its practical operation, and amendments have been adopted from time to time, to supply them. At the last session of the legislature, a different policy seems to have been adopted; for although it was quite apparent, from the experience of the past year, that great abuses had grown up under the law, and several amendments were pressed upon the attention of the legislature, no effectual remedy has been provided. The judiciary committee on the part of the house reported a bill in ample season, but it was laid on the table, until a few days before the close of the session. In the senate, nothing whatever was done until near the close of the session, when the judiciary committee, *composed entirely of members of the bar*, reported a bill *repealing the law*, and a bill actually passed the senate, by a very large majority, repealing the law, *and reviving the assignment act of* 1836. This was lost in the house by a majority of twelve votes, and the house amendments were sent to the senate. The senate struck these out, and inserted another bill, similar to the first, repealing the law. This was lost in the house by a vote of sixty-eight yeas to one hundred and eleven nays; and although there was ample time for a committee of conference; or the senate might have receded and passed some or all of the amendments, yet nothing of the sort was done — one of the senators not hesitating to say that no amendments of the law would probably be made, the determination being to ensure its repeal hereafter by rendering it as odious as possible. An attempt was subsequently made to have commissioners appointed to revise the law, but it failed, although commissioners were appointed to obtain information respecting the propriety of establishing a state asylum for inebriates, and on the laws concerning the militia. These matters, however, were urged forward by the "practical men" of the house. But in relation to an improvement of our judiciary and insolvent systems, there has been a lamentable want of efficiency on the part of those to whom we had a right to look for those improvements which experience called for. The less we have of such legislation, or rather want of legislation, the better. The whole course of proceedings in relation to the insolvent law needs to be held up to view; and if it is not done hereafter, it will not be from any want of disposition to attempt it, on the part of those who have watched the proceedings.

Trial of Negroes in Alabama.— A correspondent sends us the following account of a recent trial in the circuit court of Tuscaloosa, Ala.: Larkin and Henry, two negroes belonging to Mrs. Marr, were charged with having broken into a dwelling-house not then inhabited, and stolen goods to the value of more than twenty dollars, during one Saturday night. The goods were found in their possession, and they had fully confessed the facts charged. Indeed, the case was considered so clear that it was proposed to submit the facts proved without argument. This, however, was declined by Judge Porter, who took the following ground: That, by the laws of the state of Alabama, as they now stand, supposing the facts to be all proved, the prisoners had not committed the crime of burglary. It seems that burglary is adopted by its generic

name into the Alabama penal code. Not attempting to define it, it must be held to be the offence defined under that name by the common law, (*State* v. *Absence*, Porter's Reports, 401) namely, "breaking into a dwelling-house in the night time, *with intent to commit a felony*." The question now arises, therefore, what is *a felony* by the laws of the state of Alabama. This the state code has not left to the common law definition, but has undertaken to define as follows: "The term felony, when used in any statute, shall be construed to mean any offence, for which the offender, on conviction, shall be liable by law to be punished by death, or for which imprisonment in the penitentiary is made the appropriate punishment." (Ala. Digest, Penal Code, chap. viii. sect. 8.) If, therefore, the above facts had been proved against any white person or free person of color, it would have been a case of burglary, as stealing from a dwelling-house above the value of twenty dollars is a penitentiary offence, and therefore a felony. But, by the laws of this state, this offence is only punishable in slaves, by whipping, instead. Hence he contended that the offenders did not intend to commit a felony according to the law as it now stands in the state, and therefore could not be convicted of burglary. The case excited more interest, as no capital conviction had occurred in the county for several years; and the confessions of the prisoners had made it apparently clear against them, and there was little doubt that, if convicted, they would be executed. Several convictions of negroes for burglary have taken place under the law as it now stands, in other parts of the state. Judge Porter, however, being strongly opposed to all capital punishments, in such cases exerts himself to the utmost. This point was argued with great ability. Judge Phelan, on the bench, charged the jury at length in accordance with the argument of Judge Porter, declaring that, with the law as it at present stands, he could not lay his head peacefully upon his pillow, if he charged otherwise; and the prisoners were acquitted.

Bar Rules in Maine. The case of *Randolph A. L. Codman et. al.* v. *Alvin Armstrong*, which was tried at the March term of the Maine District Court, in Portland, before Goodenow, J. involved a question of some interest to practitioners in that state. The question in issue was, whether a practising attorney and counsellor was entitled to the *taxable costs*, in addition to term and arguing fees, where he appeared for the defendant and prevailed in the action, or whether the taxable costs for travel and attendance belonged to the party defendant.

The plaintiffs, Codman and Fox, who have long been associated in the practice of law, having their office in the city of Portland, were employed to defend an action brought by the Savage Manufacturing Company, in Maryland, against the present defendant, Armstrong, about the year 1838-9, involving a claim of $1000. The action was pending in court two or three years, and each party prevailed alternately, the defendant prevailing eventually in the suit, and recovering his costs as a matter of course. In addition to the advances made from time to time, by Armstrong, to his attorneys, in payment for their services, for arguing, term fees and disbursements, they collected of the plaintiff their taxable costs, amounting to about $80, and passed it to the credit of Armstrong, leaving a balance due to them on account, of about $30. This balance had been long due, but the plaintiffs did not exact payment, intending to be satisfied with the compensation received. At length, Armstrong, learning that the taxable costs were collected by his attorneys, called on them to refund it to him. Instead of complying with this request, they at once demanded of him the balance due them of $30, and in order to settle the question, instituted a suit. The question turned upon the point whether the taxable costs belonged to the attorney, who travelled and attended court in fact, or to the party who staid at home.

To establish the usages of the bar, the *bar rules*, signed by Samuel Fessenden, Stephen Longfellow, Charles S. Daveis, Simon Greenleaf, and some fifty other practising members of the Cumberland bar in 1829, were introduced, one of the rules being in the following words: "When the defendant prevails, the counsel or attorney may charge the *bill of costs* and the fees for *arguing the cause* to the court or jury, and *term fees*, (except at the term when

the cause is argued.)" But this evidence was objected to, to prove the usage.

Samuel Fessenden, Stephen Longfellow, and others, old practitioners in the city, and William Bradbury, John Eveleth and James O'Donnell, practitioners in the country, were then introduced and testified that in their practice they had ever been governed by the bar rules, and that the compensation therein claimed was the usual and ordinary fees for the services named; that it had been their invariable practice to claim the taxable costs as their own in addition to term and arguing fees. The jury found for the plaintiffs. Thomas Amory Deblois for the plaintiffs. Samuel Wells for the defendant.

Notch-Pot.

It seemeth that this word Notch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 287, 176 a.

In making up our present number, we find ourselves obliged to omit several miscellaneous articles and notes of recent decisions, on account of the space occupied by the case of *Freeman* v. *The People*. We regret that we are not able to furnish a greater variety in a number which commences a new volume of our journal. During the past year, as usual, some who have long travelled in company with us, have decided to go no farther, and others who have made our acquaintance for the first time propose to retain it until "further notice." The former we bid God speed with a hearty good will, not regretting to part company when more agreeable to either party; and to the latter we promise the same wish whenever they may find that they do not get so good an entertainment as they expect, or as they may think themselves entitled to. And, as we ask no one to remain with us against his will, we shall be pardoned for the determination to do our own business in our own way, keeping as well as we may in the old road, hesitating to enter upon new paths, and avoiding eccentricities, whether of manner or doctrine.

In the Bankers Magazine (published in Baltimore) for April last, under the head of Bankrupts in Massachusetts, there occurs the following sentence as original: "We have been favored, by the clerk of the circuit court of the United States for this district, with a statement, &c." Singularly enough, WE had been favored with similar information, and published the *same statement* some months ago.

The Western Law Journal states, that at a late session of the supreme court of Ohio, an applicant for admission to the bar was asked "How are estates divided? He answered, "Into sections, half sections, and quarter sections." The committee immediately reported him qualified.

In Massachusetts, the court of common pleas examine applicants for admission to the bar *in open court*. An examination like this is getting to be considered as something more than a joke.

We have received an article from Mr. Sedgwick in reply to the article of "S. G." in our last number, which will appear hereafter.

George T. Curtis, Esq. is engaged in the preparation of a work on copyright.

Obituary Notices.

In the Gulf of Mexico, by the wrecking of the British Mail-steamer Tweed, on the 12th February, Addison Fox, Esq., of the Mobile bar, aged 30. From a correspondent in Mobile we learn that Mr. Fox was a native of Fairfax county, Virginia. He was raised in Alexandria, and read law with Robert J. Taylor, Esq. He went to Mobile in 1829, and became distinguished for his talents and attainments. In manners he was urbane, gallant, modest, and of unblemished integrity. He was not fluent in speech; but in the chancery court, the supreme court of the state, and in the federal courts of the district, he ranked among the most eminent practitioners. On th occasion of Mr. Fox's death, a meeting of the Mobile bar was held, at which George N. Stewart was appointed chairman, and Percy Walker secretary. Appropriate resolutions, offered by George F. Lindsay, were unanimously adopted.

Died, in Waldoboro', Maine, Feb. 20, Hon. Isaac Gardner Reed, a distinguished member of the bar of Lincoln co unty, aged 63. For the following sketch we are indebted to a writer in

the Lime Rock Gazette: He was born at Littleton, Mass., Nov. 16th, 1783. He entered Harvard College at the age of sixteen, and was a graduate of the class of 1803. Having studied law with Hon. John Locke of Billerica, Mass., he went to Waldoboro' in 1808, and entered upon the business of his profession, which he subsequently pursued with untiring energy, and gratifying success. He was often called by the choice of his fellow-citizens to offices of trust and honor, both in Massachusetts while Maine composed a portion of her territorial jurisdiction, and in Maine, after her separation from the parent Commonwealth. For a period he represented a respectable constituency in the Legislature of Massachusetts — was an efficient and able member of the Convention that framed the Constitution of Maine, and prepared the beautiful device and elegant motto for the seal of the new state. He was subsequently a member of the local legislature — and afterwards for a period of some ten years, he was chief justice of the late court of sessions — having, in all these responsible situations, discharged every duty with credit to himself, and with honor to the places he filled.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Adlington, Thomas	Wayland,	Harness Maker,	Mar. 4,	Nathan Brooks.
Alden, Hiram,	Randolph,	Boot Manufacturer,	" 29,	Aaron Prescott.
Allen, Charles,	Lowell,	Carpenter,	" 31,	Josiah G. Abbott.
Ames, George H.	Boston,	Trader,	" 2,	Bradford Sumner.
Babbitt, Elbridge,	Ware,	Laborer,	" 4,	Mark Doolittle.
Ball, Diah,	Millbury,	Mechanic,	" 16,	Henry Chapin.
Ballard, Sylvester,	Boston,	Laborer,	" 19,	George S. Hillard.
Barber, Smith A.	Boston,	Cork Manufacturer,	" 3,	William Minot.
Barker, Stephen C.	Lowell,	Weaver,	" 30,	Josiah G. Abbott.
Bowen, Thomas,	Danvers,	Shoe Manufacturer,	" 6,	John G. King.
Bowles, William W.	Waltham,	Innholder,	" 27,	George W. Warren.
Blanchard, Lorin,	Amherst.	Carriage Maker,	" 16,	Ithamar Conkey.
Brooks, Calvin B.	New Bedford,	Laborer,	" 10,	Oliver Prescott.
Bread, Oliver,	Natick,	Laborer,	" 25,	Nathan Brooks.
Britton, James,	Quincy,	Butcher,	" 18,	Nath'l F. Safford.
Buslingham, Asa et al.	Fall River,	Butcher,	" 13,	C. J. Holmes.
Carleston, Augustus,	Sutton,	Yeoman,	" 26,	Henry Chapin.
Carley, Horace D. et al.	Boston,	Trader,	" 17,	Bradford Sumner.
Chandler, David F.	Boston,	Stone Cutter,	" 19,	George S. Hillard.
Clapp, Carlos W. et al.	Boston,	Trader,	" 17,	Bradford Sumner.
Clapp, Samuel A. et al.	Southbridge,	Merchant,	" 30,	Henry Chapin.
Clark, John S.	Lynn,	Blacksmith,	" 26,	John G. King.
Clark, Ando,	Lowell,	Teamster,	" 13,	Josiah G. Abbott.
Conroy, John,	Charlestown,	Trader,	" 13,	George W. Warren.
Cutler, Hiram et ux.	Lowell,		" 25,	George W. Warren.
Cutter, Gershom,	Medford,	Miller,	" 23,	George W. Warren.
Daggett, George W.	Worcester,	Shoemaker,	" 1,	Henry Chapin.
Draper E. B.	Boston,	Board'g House Keep-	" 24,	Bradford Sumner.
Eastman, Solomon R.	Amherst,	Husbandman, [er,	" 8,	Edward Dickinson,
Everett, Silas S.	Douglas,	Carriage Maker,	" 23,	Henry Chapin.
Fay, Dana,	Boston,	Gentleman,	" 29,	Bradford Sumner.
Felton, Cyrus,	Boston,	Laborer,	" 25,	Bradford Sumner.
Field, Mary A.	Worcester,	Seamstress,	" 8,	Walter A. Bryant.
Ford, George W.	Holden,	Yeoman,	" 4,	Benj. F. Thomas.
Foster, Thomas, & Foster, Thomas A.	Boston,	Shipwrights,	" 4,	Bradford Sumner.
Foster, William S.	Boston,	Carpenter,	" 11,	Bradford Sumner.
Fox, William,	Boston,	Carpenter,	" 18,	Bradford Sumner.
Gallup, William P.	Topsfield,	Shoemaker,	" 15,	John G. King.
Goodnow, Jotham, Jr.	Southbridge,	Merchant,	" 30,	Henry Chapin.
Grace, William P.	Lowell,	Trader,	" 18,	Josiah G. Abbott.
Griffiths, Edward A.	Charlestown,	Trader,	" 29,	George W. Warren.
Groves, Joseph,	Medford,	Blacksmith,	" 4,	George W. Warren.
Hall, John M.	Boston,	Trader,	" 31,	William Minot.
Harden, Jacob,	East Bridgewater,	Yeoman,	" 1,	Welcome Young.
Harris, Samuel,	Boston,	Shipwright & Calker.	" 8,	George S. Hillard.
Hartshorn, Edward,	Franklin,	Housewright,	" 24,	James Richardson.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Hartwell, Alexander,	Boston,	Painter,	Mar. 26,	Bradford Sumner.
Hitchings, Hans K.	Malden,	Housewright,	" 6,	George W. Warren.
Holt, Thomas A.	Roxbury,	Master Mariner,	" 4,	D. A. Simmons.
Hudson, John K	Newburyport,	Merchant,	" 18,	Ebenezer Moseley.
Hunt, Samuel J.	Lowell,	Carpenter,	" 12,	Josiah G. Abbott.
Jermagan, Alexander P.	Stoughton,	Laborer,	" 17,	Aaron Prescott.
Jewett, Shadrach S.	Littleton,	Farmer,	" 4,	Bradford Russell.
Johnson, Henry,	Boston,	Trader,	" 6,	Bradford Sumner.
Kelley, Isaiah,	Harwich,	Yeoman,	" 8,	Zeno Scudder.
Kern, Samuel C.	Sandwich,	Glass Worker,	" 26,	N. Marston.
Knapp, Benjamin R.	Newburyport,	Coppersmith,	" 10,	Ebenezer Moseley.
Learned, Lyman,	Templeton,	Farmer,	" 20,	Charles Mason.
Locke, Jonas M.	Boston,	Dentist,	" 31,	Bradford Sumner.
Low, Jennison,	Warren,	Laborer,	" 2,	Henry Chapin.
Lucas, William A. et al.	Boston,	Trader,	Feb. 24,	Ellis Gray Loring.
Main, John, Jr.	Lowell,	Laborer,	April 28,	Josiah G. Abbott.
Maloon, Benjamin,	Roxbury,	Housewright,	Mar. 17,	Sherman Leland.
Manning, David,	Paxton,	Boot Manufacturer,	" 17,	B. F. Thomas.
Marsh, Charles,	Warren,	Laborer,	" 2,	Henry Chapin.
Marshall, Isaac H.	Pepperell,	Trader,	" 13,	Bradford Russell.
Marshall, M. Drury,	Boston,	Housewright,	" 15,	Bradford Sumner
McCallum, John,	Chelsea,	Weigher & Gauger,	" 4,	Bradford Sumner.
Moffett, John H.	Boston,	Trader,	" 8,	William Minot.
Morrison, John,	Lowell,	Painter,	April 8,	Josiah G. Abbott.
Moulton, Daniel,	Fitchburg,	Innholder,	Mar. 13,	B. F. Thomas.
Moulton, Ephraim,	Sturbridge,	Merchant,	" 3,	Isaac Davis.
Mower, Gustavus H.	Boston,	Clerk,	" 2,	Bradford Sumner.
Newton, Larkin D.	Oxford,	Yeoman,	" 5,	Chas. W. Hartshorn.
Norriss, Samuel,	Malden,	Trader,	" 16,	George W. Warren.
Norris, Walter,	Salem,	Housewright,	" 10,	Ebenezer Moseley.
Northan, Alfred W.	Springfield,	Carpenter,	" 30,	E. D. Beach.
Nutter, Hazen S.	Salem,	Provision Dealer,	" 23,	Bradford Sumner.
Odierne, Calvin H.	Boston,	Porter,	" 25,	Bradford Russell.
Parsons, William E.	Boston,	Gentleman,	" 23,	Bradford Sumner.
Pattee, Asa D. 2d,	Charlestown,	Baker,	" 3,	George W. Warren.
Pierce, Otis S.	Roxbury,	Mason,	" 31,	Sherman Leland.
Pollard, Warren,	Boston,	Plumber,	" 30,	Ellis Gray Loring.
Porter, Alfred R.	Danvers,	Currier,	" 15,	David Roberts.
Puffer, James B.	Framingham,	Painter,	" 6,	Josiah Adams.
Redhead, Alanson S.	Roxbury,	Baker,	" 16,	Sherman Leland.
Reed, William S.	Fall River,	Trader,	" 4,	C. J. Holmes.
Rice, William H.	Sturbridge,	Merchant,	" 3,	Isaac Davis.
Rice, Henry B.	Springfield,	Carpenter,	" 24,	E. D. Beach.
Ricker, William,	Lowell,	Painter,	" 8,	Bradford Russell.
Robinson, Ruel,	Mansfield,	Wheelwright,	" 10,	Horatio Pratt.
Robinson, Samuel,	Taunton,	Yeoman,	" 10,	C. J. Holmes.
Ruggles, Dwight,	Boston,	Bookseller,	" 15,	Ellis Gray Loring.
Russell, Davis W.	Roxbury,	Merchant,	" 30,	Sherman Leland.
Ryan, James,	Roxbury,	Builder,	" 17,	Sherman Leland.
Saunders, Israel,	Roxbury,	Merchant,	Feb. 2,	Ellis Gray Loring.
Sears, William,	Plymouth,	Shipwright,	Mar. 29.	William Thomas.
Sewell, John J. A.	Pepperell,	Trader,	" 2,	Bradford Russell.
Sheldon, Lyman,	Webster,	Merchant,	" 2,	Isaac Davis.
Simpson, Thomas H.	Boston,	Druggist,	Feb. 8,	Ellis Gray Loring.
Sleuman, Andrew,	Boston,	Tailor,	Mar. 24,	Bradford Sumner.
Smith, John H.	Lowell,	Laborer,	" 30,	Josiah G. Abbott.
Stewart, Mary A.	Cambridge,	Board'g House Keep-	" 6,	George W. Warren.
Stone, Edmund P.	Townsend,	Victualler, [er,	Feb. 30,	Bradford Russell.
Sullings. George P. et al.	Boston,	Trader,	Mar. 24,	Ellis Gray Loring.
Sumner, Arthur,	Boston,	Carpenter,	" 18,	Bradford Sumner.
Symonds, Nathan,	Danvers,	Provision Dealer,	" 1,	John G. King.
Tallman, James A.	Dartmouth,	House Carpenter,	" 10,	Oliver Prescott.
Thayer, George W.	Taunton,	Trader,	" 22,	Horatio Pratt.
Thomas, John S.	Fall River,	Painter & Glazier,	" 5,	C. J. Holmes.
Tise, Luther K.	Charlestown,	Teamster,	" 2,	George W. Warren.
Towle, Newell,	Roxbury,	Omnibus Proprietor,	" 8,	Aaron Prescott.
Tucker, Woodbury A.	Boston,	Painter,	" 23,	William Minot.
Tukey, Francis,	Boston,	Esquire,	" 4,	Bradford Sumner.
Upham, Josiah S.	Roxbury,	Machinist,	" 17,	Sherman Leland.
Wade, John,	Boston,	Victualler,	" 19,	George S. Hillard.
Wallace, Thomas,	Roxbury,	Merchant,	" 15,	David A. Simmons.
Warfield, Lewis,	Blackstone,	Stone Layer,	" 3,	Chas. W. Hartshorn.
Warren, Aranson,	Fall River,	Wheelwright,	" 29,	Charles J. Holmes.
Watkins, Charles,	Boston,	Mason,	" 10,	Bradford Sumner.
Weeks, James B.	Boston,	Provision Dealer,	" 6,	Bradford Sumner.
Wells, Thomas G.	Boston,	Broker,	Feb. 3,	Ellis Gray Loring.
Whitney, Nathaniel P.	Grafton,	Laborer,	Mar. 8,	Henry Chapin.
Wilmarth, Fred. et al.	Fall River,	Butcher,	" 13,	C. J. Holmes.
Wormwood, John S. et al.	Boston,	Painter,	" 23,	William Minot.
Young, James R.	Southbridge,	Mechanic,	" 24,	Henry Chapin.